IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

United States of America, Plaintiff,

vs.

T. J. Pendergast, R. E. O'Malley, A. L. McCormack, Defendants.

No. 14912.

SEPARATE PLEA IN ABATEMENT OF DEFENDANT, R. E. O'MALLEY

Comes now the defendant, R. E. O'Malley, and appearing specially by his duly authorized attorneys for the purpose of this plea in abatement only, and as grounds therefor respectfully represents and shows to the court as follows:

I.

On or about June 24, 1940, a grand jury consisting of twenty-three members was summoned and impaneled for the Western Division of the Western District of Missouri, and one of the judges of this court, towit, Honorable Merrill E. Otis, charge said grand jury, using the following language:

"Mr. Foreman, and gentlemen, on the 29th day of May, 1939, a three-judge court, consisting of the Honorable Kimbrough Stone, Senior United States Circuit Judge for the Eighth Circuit, the Honorable Albert L. Reeves, Senior United States District Judge for this District, and myself, in open court, called upon the then United States Attorney to take steps to cause to be cited before that Court for contempt of court any individuals whom his investigation would show had been guilty of contempt; called upon him also to present to the grand jury then in session or to the next grand jury which should be in session, any evidence he might be able to gather which would tend to show that the crime of obstructing the administration of justice in a federal court had been committed. That I say was on the 29th day of May, 1939, a year ago.

"When the three-judge court through its presiding judge gave those directions to the United States Attorney, the court had certain definite things in mind. Everybody knew what was in mind. Only two days before, on May 27th, and five days before that, on May 22nd, pleas of guilty to the crime of attempting to evade the payment of income tax had been made respectively by Robert Emmett O'Malley and Thomas J.

Pendergast, and they had been sentenced. There was every reason to believe, although as yet there had been no proof, that they and others had perpetrated an outrageous contempt upon the three-judge court, and that they and others had been guilty of the crime of obstructing justice in a federal court.

"They had been charged only with the offense of attempting to evade the payment of an income tax. They had been sentenced only for that offense, -- the only offense which was charged, the only offense which was confessed, the only offense which was admitted to have been committed. They could not be punished for other offenses. It was made emphatically clear, so that no one in the world would have the slightest doubt of it, that the punishment which was imposed was for the offense charged and that the persons who were sentenced might yet be charged with other offenses in the courts of the state, that they might yet be charged with other offenses in the courts of the United States. It was made clear that when those charged should be preferred against them, if every they were preferred, they would be entitled to fair trials and hearings upon those charges.

"The three-judge court, speaking through its presiding judge, on May 29, 1939, had in mind, as I have said, that an outrageous contempt had been committed against that court, and that there had been committed also the offense of obstructing justice against the law of the United States. But the matter which was primarily before the three-judge court on May 29, 1939, was what disposition should be made of a huge fund of millions of dollars which had been impounded by that three-judge court to await the decision on the merits of insurance litigation involving the validity of rates which had been prescribed by the Superintendent of Insurance. If that litigation should be decided favorably to the insurance companies, the insurance companies were to get all of the fund. If that litigation should be decided adversely to the insurance companies, they were to get knoe of the fund, but all of it was to be paid to the policyholders who indirectly had contributed it. On May 29, 1939, the matter that primarily was before the court was how the fund then should be distributed, since it had been developed that fraud had been practiced upon the court. It was contended by the Superintendent of Insurance that in view of that fraud, the whole fund should now go back to the

policyholders. It was contended by the insurance companies that the litigation originally instituted should be decided upon the merits and the fund distributed in accordance with whether that decision was for the companies or for the Superintendent.

"That matter which was primarily before the court, could not be passed up without the hearing of much evidence. A Master was appointed to hear that evidence. He heard evidence for a period of months. After the evidence was heard, and it was heard all over the United States, it was four months or more before he could complete his report, a very difficult and highly technical task. After his report was completed, it was several months before the attorneys for the several parties had completed their briefs and could submit the case to the Court. It was submitted on the 20th day of May, 1940. It has not yet been decided. The three-judge court, meanwhile, having taken cognizance of the fact that no action had resulted from the direction on May 29, 1939, to the United States Attorney, and being utterly unwilling that there should not be action taken, called the acting United States Attorney before the Court and, in open court, speaking through the presiding judge, repeated in substance the direction which had been given first on May 29, 1939, a year, lacking nine days, before.

"So you will know exactly what was said to the acting United States Attorney, in whom all of the judges of the court have the utmost confidence and whose ability they most highly respect, I shall read to you what was said, a part of it:

'It is apparent from the statement of counsel upon both sides here that there is, in the evidence in this regard, ground for believing that there has been a very gross imposition and fraud perpetrated in and upon this Court by at least Pendergast, O'Malley and McCormack, and there may be others.'

'It is, therefore, evident to the members of this Court that such proceedings should be taken against any or all of these persons as may be warranted and we feel that contempt proceedings are warranted.'

'With that in view, it is the request of this Court that the acting United States Attorney shall prepare such pleadings and citations as may be necessary to cite in contempt of this Court, and for contempt, the three persons named and any others

which an examination of this evidence or any other knowledge which he may have or may obtain to warrant him in also including.'

'The statues of the nation make it a criminal offense to interfere with, impede or obstruct the administration of justice in a national court. Of course, the Court has no power in itself, as no federal court has, to initiate criminal proceedings. That must be done through the executive branch, acting in turn through the Grand Jury, but in view of the situation which is presented by this record, we request and urge the acting United States Attorney in this District to place before the next Grand Jury, which assembles in this division, such facts as he may be able to acquire to ascertain whether there is sufficient basis for indictments against the three men named and/or any other for violation of those acts.'

"Then the presiding judge said to the acting United States attorney:

'Mr. Phelps, is your office willing to assume those duties?'

"And he answered:

'Your Honors, our office is ready and willing to assume any responsibility which this Court may ask us to take upon ourselves. I will prepare at the earliest possible time the citations you have asked for and the matters that you have asked to be submitted to the Grand Jury will be submitted to them.'

"So much, gentlemen, by way of preface to the charge.

"I assume that it was not very necessary to give you this preface, since it is almost a matter of common knowledge and has often been printed in the public press, but I did give you the preface. I now propose to do my duty and to charge the grand jury upon the subjects referred to by the three-judge court, speaking through its presiding judge, Judge Stone, and first of all, I ready to you the statutes upon which such indictments as may be returned in this connection, upon on e or both of them, must be based. They are very short. The first is this: Section 241 of Title 18 of the United States Code. I read only so much as will be of importance to you:

'Who ever corruptly in any court of the United States shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice

therein, shall be fined not more than $1,000 or imprisoned for not more than one year or both.'

"That is one of the two statutes which I call to your attention, and the other is this: Section 88 of Title 18 of the United States Code,

'If two or more persons conspire to commit any offense against the United States, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined ono more than $10,000, or imprisoned not more than two years, or both.'

"Now, gentlemen of the grand jury, I charge you that if evidence is presented to you, as I am sure it can be presented to you, which tends to show that any person corruptly sought to influence, obstruct or impede, or endeavored to influence, obstruct or impede the administration of justice before the three-judge court to which I have just made reference, that person should be indicted for the offense denounced in Section 241 of Title 18 of the United States Code, and I charge you in that connection that if any person sought to obtain and did obtain from the three-judge court a decree by the false representation that it was bottomed upon an honest settlement between litigants, when as a matter of fact it was not bottomed upon an honest, but upon a corrupt settlement obtained by bribery – I say if the evidence shows that any person sought to obstruct justice by obtaining a decree of the court in such a way and sought to obstruct justice further by seeing to it that the decree thus obtained should remain in full force and effect for an indefinite period after it was obtained, if there is any evidence that justifies any such conclusion as that, it will be you duty to indict the persons to whom that evidence points, one person or two persons or three persons or one hundred persons.

"Furthermore, I charge you that if the evidence which is produced before you shows that two or more persons conspired together that they would bring about a violation of Section 241, that section which prohibits the obstruction of justice in a Federal Court – I say if the evidence produced before you shows that two or more persons conspired to do that and that one or more of the conspirators perpetrated any overt act in carrying out the conspiracy, then it will be your duty also to indict those persons against whom there is such evidence for the crime of conspiracy to commit an

offense against the laws of the United States; and I say in that connection that if the evidence shows that two or more persons agreed, by corruption, by the use of bribery, that an ostensible settlement of the litigation pending in the three-judge court should be reached, if they agreed that that ostensible settlement should be presented to the three-judge court as an honest settlement, that the judges of the court should be led to believe that it was an honest settlement and should hand down a decree bottomed upon it; if, furthermore, they agreed that for the purpose of keeping that decree in full force and effect they would during a period of years, if necessary, make it impossible for the Court to ascertain that the settlement had been obtained by corruption and bribery, I say, if the evidence tends to prove those facts, it would justify the returning of an indictment charging with conspiracy to commit an offense against the laws of the United States all parties shown to have so conspired.

"What I have said ordinarily would be quite sufficient to submit to you the specific matter which it is my duty to submit to you. It so happens, however, that it is not quite sufficient under the circumstances.

"I assume that all members of this grand jury read the papers, especially such excellent papers as are published in Kansas City. I assume that you read yesterday's papers and I take it for granted that if you eye caught the title, you must have read that article which had to do with the grand jury which had been called. You read that this matter that I have submitted to you would be submitted to you, and you read also that it was contended by some lawyers – they were not named in the articles – that the statute of limitation had run against the offenses, which would be submitted to the grand jury in the charge, and that even if indictments were returned by the grand jury, they could not successfully be prosecuted, because of the statute of limitations. I assume that you read that, and because you read it, I advert to that subject briefly, lest anyone should be misled by the theory which, in those articles, was ascribed to certain lawyers who were not named.

"First of all, I say to you gentlemen of the jury that the grand jury is not concerned with any statute of limitations. That is a matter, whether it applies in a given case, which is a judicial question, which must be decided by the court before which an indictment is

prosecuted. It is a question sometimes difficult of solution. In any event, it is a judicial question. It is not a question for the grand jury. One who is indicted for an offense and who believes that the statute of limitations in his favor may assert it as a defense or he may not. He may waive it. One does not know whether, in any event, the statute of limitations will be waived until the case is presented to the Court. It is not a question for the grand jury. That is the first thing I have to say, and I might stop there, but I am not willing to stop there.

"I say to you that in my considered judgment no statute of limitations bars the prosecution of any of the matters which I have said to you are submitted to you for your consideration. Let me illustrate my meaning. I think it will be perfectly clear then to those who have any interest in the matter that the statute of limitations has no application.

"The statute that persons have in mind is the three-year statute, and that, I think, is the statute which applies to such offenses and which applies also to the offense of contempt of court. Of course, you are not concerned with contempt of court. That is a matter for the three-judge court. I think it is the three-year statute which applies. That statute is that one cannot be convicted of a crime, if he asserts the defense of the statute, if the crime was completed more than three years before the indictment is returned. If the crime was committed within three years, or completed within three years, then the indictment is good and the defense of the statute of limitations is bad.

"Now, those who have said – I do not know who they are, but who were quoted in the articles which you have read – that the statute of limitations had run in these matters had in mind, I have no doubt, that the last payment of bribe money in connection with the insurance litigation was on October 25, 1936. Three years from that date is October 25, 1939. Incidentally, I may say that that was more than five months after the three-judge court on May 29, 1939, directed that action should be taken. Bu the last act in the offenses which I have asked you to investigate and as to which evidence may be produced before you, was committed long after October 25, 1936. I am not speaking now upon hearsay no upon mere rumor. Here is the evidence that was taken before the master appointed by this court (indicating), taken during the last year, thousands of pages. All parts of that evidence that have to do with the matters that I am now

submitting to you I read, and I have read also the master's most admirable summary of the whole evidence.

"I say to you that evidence may be presented to you, if the witnesses are still living, and they are still living, if they are brought here, and they can be brought here from the four corners of the nation, wherever they are, I say that evidence may be presented to you, if it is the same as is in this record, which will establish not only a violation of the statutes forbidding and punishing the obstruction of justice, but also establishing that a conspiracy was formed to violate that statute, to bring about a violation of that statute.

"I say to you gentlemen that there may be presented to you evidence that there was a fund of millions of dollars impounded by the three-judge court, the exact amount I do not now recall, I think it was close to $8,000,000. Certainly it was more than $6,000,000.

"That fund, as I have said, was to go to the insurance companies if they won the litigation on the merits. Every cent of it was to go to them. If they lost on the merits not one cent of it was to go to them, but all was to go back to the policyholders who had contributed it indirectly, through the insurance companies, to the fund.

"Now, the evidence will show – it will justify the inference – that the insurance companies just before the cases were to be decided on their merits were not so certain that they would win on the merits and get all of the fund. There was a possibility they would lose and get none of it. They preferred to have a substantial part of it rather than none of it and to have that substantial part now, rather than at the end of the litigation and at the end of an appeal which might take years. I say the evidence will justify that inference. They wanted eighty percent of the fund now, rather than to run a chance of getting none of it. The evidence will prove that.

"The evidence will justify the inference that one whose name is Charles Street -- I am calling names today -- who was the agent of the insurance companies and had been their agent for years, they had great confidence in him, the evidence is that he met with the insurance companies, their executives, and said he thought he could obtain a settlement of this litigation whereby the insurance companies would get eighty percent.

They authorized him to effect such a settlement. I do not say and I do not believe that they had any idea that he would undertake to effect the settlement by illegitimate means. They authorized him to effect a settlement. He decided he would do it; if he could not do it otherwise, he would do it by illegitimate means.

"Thereafter there was a conspiracy, the evidence will show, if the evidence in this record is submitted to you, between Street and at least three others, those who were named by the three-judge court. A conspiracy to do what? A conspiracy to obstruct the due administration of Justice in the United States three-judge courts. How was that to be done? It was to be done by obtaining a so-called agreement of settlement between the companies and the Superintendent of Insurance, by obtaining it by bribery, by the payment of a huge fund contributed by the insurance companies to the Superintendent of Insurance and to others who had influence with the Superintendent of Insurance. That was the conspiracy, in part, to obtain such a settlement and to obtain from the United States District Court by the false representations to the Court that there had been an honest settlement, to obtain a decree from the Court, giving eighty percent of the money to the insurance companies.

"But that was not all of the conspiracy which the evidence will show. Such a conspiracy, even If accomplished, would be of no value, if that was all. The conspirators knew that if the Court had the slightest inkling that the settlement was the result of bribery and the decree would not be entered, and they knew furthermore, that if the Court ever discovered that the settlement had been obtained by corruption and bribery, they would set aside the decree in a minute and demand the return to the custodian of the court of whatever had been paid out under the decree. They knew that, so the conspiracy went further.

"They conspired together, not only that they would obtain the decree from the Court, but that they would by affirmative acts, prevent the Court ever from discovering that the decree was bottomed upon a corrupt settlement obtained by bribery. That was necessary if the conspiracy was to have any value to the conspirators or to the insurance companies. It was necessary that it should he continued and that the conspirators by affirmative acts should prevent the discovery of the fact that the

settlement was bottomed upon corruption and fraud, so the conspirators agreed together. The evidence will show it, if it is the same evidence that is in these bodes, if it is the same evidence that I know stay be produced. The evidence will show that the conspirators agreed, not only that money should be paid, — that was one of the necessary steps, that money should be paid to the Superintendent of Insurance — but they agreed that this man Street — Street now is deceased — they agreed that this man Street should conceal from his principals, the insurance companies, what this money was being used for. They knew full well that if the executives of the insurance companies ascertained the money they had contributed had been used in bribery and corruption of individuals who had litigation pending in the court — they knew perfectly well that the executives might reveal that fact at once. They might not want to run the risk of being mixed up knowingly in such an affair, they certainly would not have desired to run that risk; so these conspirators agreed that Street, by affirmative acts, should conceal even from the Insurance executives for what purpose the money was to be used, which they were contributing to him. They agreed that that should be done in this way: that he should say to them, 'Gentlemen, I need $100,000 or $200,000 or $3OO,OOO from the insurance companies.' There were around 100 of them,

I think, 100 insurance companies. It was not so much from each company. They agreed that if the executives should say to him,

'Well, what do you want this money for?' he should say, 'I want it for legitimate expenses, for legal expenses.' And then they agreed that if that were not satisfactory, as they knew it might not be satisfactory to some insurance executives, he should go further. They agreed that he should say to the insurance executives, 'Well, when the litigation is all finished, I will furnish you an accounting. It will show exactly how the money was used.' They agreed that he should make that representation to the insurance companies, but they agreed that he should never make the accounting. The evidence will show that, and the evidence will show that he never did make the accounting, that he continued affirmatively to decline to furnish, an accounting although he had expressly promised the accounting. The evidence will show that.

"The evidence will show, gentlemen, more than that, if the evidence is such as I am certain exists and can be produced. The evidence will show that these conspirators agreed among themselves that to prevent any discovery of what had been done, of what methods had been employed to obtain the settlement that was the basis of the decree in the court, and to make it impossible that the Court would learn the truth and would set aside the decree and recall the money from the insurance companies, they agreed that if anyone of them ever was put under inquisition by any public officer, he would deny any knowledge of the whole transaction, would assert that he had no knowledge of it. They agreed to that. The evidence will show that. And the evidence will show that as late as a few weeks before the indictments charging attempts to evade income tax were returned, long after October 25, 1936, not only one but two of these conspirators affirmatively denied that they knew anything at all about what was then suspected, namely, that the settlement had been obtained by corruption and fraud. One of them — his name was McCormack — was called before the United States Attorney and subjected to the most stringent questioning, and he affirmatively denied, over and over again, t as was now suspected had taken place. That was in furtherance of the conspiracy to conceal. He was called before the grand jury. I believe the evidence will show, and there he said he knew nothing, and then, perhaps due to the greet earnestness and the greet capacity and ability of the United States Attorney, he changed his mind and told the truth.

"The evidence will show — I am sure that evidence will be found to show that another of these conspirators, when it was suspected that he had some connection with this affair, was interviewed by representatives of the press. In carrying out the conspiracy, he denied to the representatives of the press that he had any knowledge whatever of any corrupt settlement. Those were affirmative acts of deception practiced for the purpose of preventing the discovery that the settlement upon which the decree was bottomed was corruptly obtained. Those were affirmative acts of deception, those and others, which were for the purpose of making effective the conspiracy, for the purpose of continuing the obstruction of Justice, which had been brought about, and

those affirmative acts of deception happened long after October 25, 1936, and far within a period of three years looking back from this present date.

"So I say to you, gentlemen of the jury, since the matter has thus been called to your attention, that there is no statute of limitations which will prevent the prosecution of such an indictment as you will return, if you return an indictment. If the evidence is such as I believe it is and as I believe it will be presented to you, no statute of limitations will prevent the prosecution of an indictment charging conspiracy or an indictment charging the substantive offense of obstructing justice. If a man is charged with the offense of obstructing a public road, because be he has built a fence across the public road, that offense continues as long as the fence remains in the public road, and if there is a statute of limitations governing a prosecution for tout offense, and there is in the state code, that statute begins to run when the obstruction is removed, not when it was set up. Similarly, if one is charged with obstructing the administration of justice in a United States Court, the statute of limitations does not begin to run when the obstruction was created, but begins to run when it is no longer maintained. Although you are not concerned with the matter, I say to you also that it is my considered opinion that there is no statute of limitations that prevents prosecution before the three-judge court of the offense of contempt, if it is bottomed upon the same facts as those I have Just now outlined to this grand jury.

"I have nothing further to say concerning this specific matter.

"Ordinarily my charge to a grand jury, unless there is some specific matter, is concluded in ten minutes from the time it starts.

"It is your duty, gentlemen, as grand jurors, to consider evidence that will be presented to you or that you any cause to be presented to you as to any offense against any criminal law of the United States, and if the evidence shall be such as reasonably leads you to believe that an offense has been committed, it will be your duty to return an indictment against the person whom tows evidence points to.

"You are concerned only with offenses against the laws of the United States, not with offenses against the state.

"An offense need not be proved to you beyond a reasonable doubt. That is the measure of proof that is required when the petit jury tries the case. It is only necessary for you to hear evidence tending to establish each of the essentials of the offense, There must be evidence tending to establish each of the essentials of the offense. It must be by sworn testimony. The foreman of the grand Jury will administer the oath to the witnesses.

"If the evidence, as I say, thus produced to you, tends to show that any man in the Western District of Missouri, which is the western half of the State of Missouri, has violated any criminal statute of the United States, it will be your duty to return an indictment against him.

"Sixteen of your number are necessary to constitute a quorum at any time. You cannot transact business unless there are sixteen present. Twelve of your number concurring are necessary to return an indictment. If twelve do not concur, you should return a no true bill, and the person against whom there is no indictment returned, in the ordinary course will be discharged, if he is in custody; if he is on bond, his bond will be released. If twelve concur, then he should be indicted and a true bill is returned, and the normal course will follow.

"Your work must be done in secret. That is to say, it comes to voting upon whether an indictment shall be returned, you must be alone in the grand jury room, which will be provided for you. The United States Attorney and his assistants will present testimony to you, will examine witnesses before you.

You may examine them yourselves. When the examination of witnesses has been completed, when it comes to the voting upon whether an indictment shall be returned, that must be done by yourselves alone. You must maintain secrecy as to what transpires in the jury room not only during the session of the grand jury, but always, unless you are called upon to testify in a court of justice concerning what may have transpired in the grand jury room. Otherwise, the secrecy must forever be maintained.

"There is nothing further, I think, that I shall say to you. Many characters of offenses will be presented to you. Those dealing with violations of the narcotic laws, those dealing with violation of other revenue laws, those dealing with the protection of

the mails, those dealing with the protection of the currency and the obligations of the United States, many characters of offenses will be presented to you. As to each of them and as to each instance of an alleged violation, what I have said to you as to your procedure will govern your actions.

"A great responsibility, gentlemen of the grand jury, rests upon you. Without your action, there can be no prosecution for a criminal offense, that is without the action of some grand jury. It is responsibility, I know, that well may be reposed upon gentlemen of your character.

"I want to thank you for the close attention you have given to this charge. If at any time you desire any further charge from the Court, or a repetition of any part of the charge, you have only to indicate that fact and your request will be complied with. You will have also, whenever you ask it, the advice of the United States Attorney and his assistants.

"The audience will remain seated. The bailiffs will show the grand jury to the grand jury room."

II.

Thereafter, and on or about June 25, 1940, said court further charged said grand jury, using the following language:

"THE COURT: Mr. Foreman and Gentlemen, since you were charged on yesterday morning, I have been furnished by the court reporter with a transcript of the charge and I have read it carefully. Having read it, it has seemed to that I should supplement it briefly. I do that now, so that there never can be any justification for a suggestion toy any person that the charge was not fair and proper.

"Over and over again in the charge I said to you that any indictment returned by you must be bottomed upon evidence produced before you. I want to say that once more. I do say it once more and I say it emphatically. And because I called specifically to your attention possible offenses connected with the insurance litigation before the three-judge federal court, I say to you specifically in that connection that no indictment should be returned unless it is bottomed upon evidence produced before you, reasonably tending to show that offenses have been committed.

"In connection with my discussion of possible offenses connected with the insurance litigation I said that if the evidence which had been presented to the three-judge court was produced before you it would tend to support certain conclusions. I assumed it would be produced before you. Of course, I do not know that that evidence will be produced before you. I do not know that witnesses will testify before the grand jury as they have heretofore testified. So I say to you again and I say it emphatically that any indictment must be bottomed on the evidence produced before you. No indictment can be bottomed on evidence produced before the three-judge court unless it also is produced before you, nor upon my interpretation of that evidence, nor upon any evidence whatsoever except that produced before you.

"In my charge I mentioned certain individuals by name. It would have been farcical not to have done so, since those names have been blazoned forth in headlines for months and now for years in this connection. What was said in open court by the presiding judge of the three-judge court has been published over and over again and is a matter known to all men in this district. Not to have mentioned names would have been to imitate the ostrich and to suggest that honorable and intelligent grand jurors had no more perception or knowledge than ostriches which hide their heads in the sane. Because, however, I thought it was proper to mention the names which, without my mentioning them, already were present in the minds of every juror, I now say to you and say emphatically that no indictment should be returned against any person, mentioned of unmentioned in the charge, unless the evidence produced before the grand jury warrants the indictment."

III.

Thereafter, on July 13, 1940, said grand jury, acting under and pursuant to the charges aforesaid, returned the indictment herein.

IV.

Said chargee and each part and element thereof were illegal, improper, erroneous and violative of defendant's rights and defendants constitutional rights; the making of said charges and the returning of this

indictment against this defendant and the other defendants as a result thereof was and is in violation of Article V of the Amendments to the Constitution of the United States of America, which, in part, provides, "No person shall be hold to answer for a capital or otherwise infamous crime unless on the presentment of indictment of a grand jury * * *; nor shall any person * * * be deproved of life, liberty or property without due process of law * * *"; and in violation of Article VI of the Amendments to the Constitution of the United States of America, which, in part, provides, "In all criminal prosecutions, the accused shall enjoy the right to a * * * trial by an impartial jury of the state and district wherein the crime shall have been committed * * *". and in violation of defendant's right to a fair, just, lawful, impartial and unbiased presentation and consideration of the facts and the law applicable thereto by said grand jury and the Court charging same;

Said charges to said grand jury illegally and improperly represented to and advised said grand jury that defendant had committed an offense and had committed a criminal offense and was guilty of an offense; that said charges to said grand jury illegally and improperly represented to and advised said grand jury that there existed evidence that defendant was guilty of a crime, that that evidence was available, that that evidence was sufficient to establish defendant's guilt, that that evidence could and would be produced before said grand jury, that the Court believed that evidence and that after that evidence was produced the grand jury should and would be entitled to return an indictment against this defendant and the other defendants;

That said charges illegally, improperly and unlawfully represented to and advised said grand jury that the statute of limitations had not run, that it was the considered opinion of the Court that the statute of limitations had not run, and that said grand jury and the members thereof should give no consideration to such matter! that said charges to said grand jury illegally, improperly and erroneously represented to and advised said grand Jury that the effect of the three-year statute of limitations was that one cannot be convicted of a crime if he asserts the defense of the statute that the crime was completed more than three years before the indictment was returned, whereas, the three-year statute of limitations provides: "No person shall be prosecuted, tried or

punished * * * unless the indictment is found or the information is instituted within three years next after such offense shall have been committed"; that, as a result of said charges said grand Jury were led to and did consider the matter discussed in the Court's charges and return the indictment herein) that said charges to said grand jury were eloquent, forceful, stirring, convincing and persuasive and persuaded and induced said grand jury to return said indictment; that said charges, in legal effect, were a direction to said grand jury to indict this defendant and the other defendants) that said charges, by suggestion, inference, and express language, stated that said defendants had committed an offense against the United States) that said charges erroneously, improperly and illegally gave said grand jury to understand and believe that it was the duty of said grand Jury to return indictments against this defendant and the other defendants; that said charges illegally, erroneously and improperly consented upon evidence which would be brought before said grand jury, and stated that said evidence would support an indictment against this defendant and the other defendants; that said charges constituted a usurpation and an invasion by the court of the grand jury's province, powers, duties and prerogatives) that said charges created and aroused animosity against this defendant and the other defendants) that said charges were convincing and persuasive and deprived defendant at his rights to have the alleged offenses considered and passed upon by an impartial grand jury, basing its inquiry only upon lawful and legal evidence produced before it) that said charges c instituted an expression of opinion by the court of the guilt of this defendant end other persons to be investigated, and in expression of opinion by the court that there was sufficient evidence warranting the indictment of this defendant and the other defendants to be investigated, and an expression of opinion that a violation of the federal laws had occurred, and an expression of opinion that an offenses against the United States had been committed by this defendant and other defendants; that said charges singled out this defendant by name to the attention of the grand jury, he being s person, as well as other persons, who was to be the subject of the investigation; that said charges deprived this defendant of his rights under the Constitution and the laws of the United States, and particularly the Fifth Amendment to the Constitution of the United States, wherein it is provided that

no person shall be held to answer for a capital or otherwise infamous crime unless upon a presentment or indictment of a grand jury, and that no person shall be deprived of life, liberty or property without due process of law, and particularly, the Sixth Amendment to the Constitution of the United States of America, wherein it is provided that the accused shall have the right to a trial by an impartial jury in a criminal proceeding; that said charges illegally, improperly, erroneously and unconstitutionally advised and told said grand jury of the action taken by the Honorable Kimbrough Stone, Senior United States Circuit Judge for the Eighth Circuit, the Honorable Albert L. Reeves, Senior United States District Judge for the Western Division of the Western District of Missouri, and the Honorable Merrill E. Otis, upon the 29th day of May 1939; that said charges illegally, improperly, erroneously and unconstitutionally advised and told said grand jury of the opinions, ideas, comments, and attitude of each of such judges with respect to the matters in question; that said charges erroneously, illegally, improperly, and unconstitutionally contained a recital, word for word, of the comment made by said three-judge court upon the 29th of May 1939 by and through the presiding judge of said three-judge court; that the placing of said comment before said grand jury and the reading of same to said grand jury was illegal, improper, erroneous, and violated defendant's constitutional rights; that said charges inadvertently, illegally, erroneously, and improperly represented to and advised said grand jury that certain evidence contained in the record of Honorable Paul Barnett, Master, if submitted to said grand jury, would show that there was a conspiracy between this defendant and the other defendants to conceal and keep secret the commission of the alleged offense or offenses, and that said evidence would justify the inference that there was such a conspiracy.

V.

That there was no evidence submitted to or before said grand jury showing, tending to show, or giving probable cause to believe, that the statute of limitations had not run; that there was no evidence presented to or before said grand jury showing, tending to show, or giving probable cause to believe, that any act or any overt act had been performed within the period of the Statute of Limitations; that there was no

evidence presented to or before said grand jury showing, tending to show, or giving probable cause to believe, that this defendant and the other defendants Jointly charged with him conspired, confederated, or agreed together to conceal and to keep secret any of the acts or matters alleged or set forth in the indictment; that the allegations of the commission of overt acts within the period of the Statute of Limitations, and the allegations of Overt Acts, numbered IX and X were included in and incorporated in the indictment without any evidence being presented to said grand jury to support same for the purpose of evading the Statute of Limitations; that there was no evidence presented to or before said grand Jury showing, tending to show, or giving probable cause to believe that the alleged acts set forth in Overt Acts, numbered IX and X , were committed in pursuance of a conspiracy among the defendants to conceal and keep secret the other acts set forth in the indictment; that one A. L. McCormack was the only witness who testified before said grand jury; that said McCormack also testified before the Honorable Paul Barnett, Master in the Insurance Rate litigation aforesaid; that in his testimony before said Master said McCormack denied that there was any agreement or conspiracy to conceal or keep secret the alleged facts connected with the settlement of the fire insurance rate litigation; that the Honorable Richard K. Phelps,united States District Attorney, was present while the evidence in this matter was presented to and heard by the grand jury; that one Mrs. Vivian Krimminger, a court reporter, was present during the presentation of said evidence to said grand jury and reported and made notes of such testimony; that possibly another court reporter also reported a portion of such testimony; that shorthand notes were made of all such testimony; that said notes have been transcribed and typewritten; that such transcription and typewriting is now in existence and in the possession of said Mrs. Vivian Krimminger; that in this connection defendant prays that the court take testimony and hear evidence with respect to what testimony was presented before said grand jury and particularly with respect to the fact that no evidence was presented said grand jury showing, tending to show, or giving probable cause to believe that any overt act in furtherance of any conspiracy was committed within the period of the Statute of Limitations, and that no evidence was

presented said grand jury that there was any conspiracy with respect to secrecy or concealment.

VI.

That said indictment obtained and returned as aforesaid is wrongful and a violation of the rights of this defendant; that he should not be put upon trial of said indictment; that it is not a lawful indictment of a grand jury of the United States; that he has not been charged with an offense in the manner and under the circumstances guaranteed by the Constitution and the laws of the United States, and particularly the Fifth and Sixth Amendments to the Constitution of the United States; that said indictment should be abated and the same dismissed.

WHEREFORE, defendant R. E. O'Malley prays the court to hear evidence as aforesaid and abate said indictment and to dismiss the same and to discharge him from any further answer thereto and at the cost of the United States, and that the United States be required to show cause why said indictment should not be abated, dismissed or quashed on account of the facts herein set forth.

James B. Aylward
George V. Aylward
Terence M. O'Brien
Attorneys for Defendant.

STATE OF MISSOURI,)
) SS.
COUNTY OF JACKSON.)

R. E. O'MALLEY, of lawful age, being first duly sworn, upon his oath states that the facts and matters set out in the above and foregoing plea in abatement are true according to this best information and belief.

R. E. O'MALLEY

Subscribed and sworn to before me this 5th day of September, 1940.

My commission expires February 2, 1944.

Helen C. Cathbertson, Notary Public within and for the County and State aforesaid.

Service of above plea in abatement acknowledged this 5th day of September, 1940.

Richard S. Phelps, Acting United States District Attorney.

No. 14,912.

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION.

United States of America, Plaintiff,

vs.

T. J. Pendergast, R. E. O'Malley, A. L. McCormack, Defendants.

SEPARATE PLEA IN ABATEMENT OF DEFENDANT, R. E. O'MALLEY

FILED SEP 5 1940

A. L. ARNOLD, Clerk

By W.W. Caster, Deputy

James P. Aylward, George V. Aylward, Terence M. O'Brien, Attorneys for Defendant.

Re-FILED SEP 9 1940

A. L. ARNOLD, Clerk

By Dan C. Kelliher, Deputy