

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

UNITED STATES OF AMERICA, Plaintiff,

vs

T. J. PENDERGAST, R. E. O'MALLEY, A. L. McCORMACK, Defendants.

No. 14,912.

SEPARATE PLEA IN ABATEMENT OF DEFENDANT, T. J. PENDERGAST

Comes now the defendant, T. J. Pendergast, and presents this, his separate plea in abatement and for grounds thereof respectfully states that on or about the 24th day of June, 1940, a Grand Jury was duly summoned and impanelled for the Western Division of the Western District of Missouri; that one of the Judges of said Court, to-wit the Honorable Merrill E. Otis, charged said Grand Jury in full as follows:

"The COURT: 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. Beeves, 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 offenses 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 ever 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 laws 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 none 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 statutes 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 read to you the statutes upon which such indictments as may be returned in this connection, upon one 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:

'Whoever 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 \$1000 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 not 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 your 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 your 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 limitations 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. This 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 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 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. But 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 nor 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 court. 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 corruption, 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 be 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 books, if it is the same evidence that I know may 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 \$300,000 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, that any such thing 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 great earnestness and the great 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 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 that 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 may 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 the 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, when 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 in 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.

Thereupon, on Tuesday, June 25, 1940, at 9:30 o'clock A.M., the Court further charged said Grand Jury as follows:

"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 me that I should supplement it briefly. I do that now, so that there never can be any justification for a suggestion by 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 sand. 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 or unmentioned in the charge, unless the evidence produced before the Grand Jury warrants the indictment."

Defendant says that said charge to the Grand Jury was improper, inflammatory, prejudicial and violative of the constitutional rights of this defendant in that it was, in

effect, a direct charge upon the part of the Court that this defendant (naming him) was guilty of the offense charged in the indictment filed herein; that the direct and inevitable effect of said charge was to persuade and force the Jury into returning said indictment; that in said charge His Honor Judge Otis told the Jury that His Honor Judge Kimbrough Stone, Presiding Judge of the United States Circuit Court of Appeals for the Eighth Circuit, had ordered the United States District Attorney to make an investigation for the purpose of determining whether or not this defendant (naming him) and others had violated the federal statutes by conspiring to obstruct and by obstructing justice in the three-judge Federal Court in connection with insurance litigation pending therein.

Defendant further says that in this connection His Honor Judge Otis read to the Grand Jury a statement made in open Court on the 29th day of May, 1939, by His Honor Judge Kimbrough Stone to the then Acting U.S. District Attorney for the Western Division of the Western District of Missouri and his reply thereto; that said statement so read by his Honor Judge Otis to said Grand Jury and the reply of the Acting U. S. District Attorney were as follows, to-wit:

"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 statutes 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.

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

"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."

Defendant further says that by reading the statement of His Honor Judge Stone to the Grand Jury, His Honor Judge Otis improperly and prejudicially placed before the Grand Jury the fact that His Honor Judge Stone had told the District Attorney, and later the Acting U.S. District Attorney, that there was evidence and ground for believing that there had been a gross imposition and fraud perpetrated in and upon the three-judge court by at least Pendergast (meaning this defendant), O'Malley and McCormack and that he, Judge Stone, had also called upon the District Attorney to investigate said matter and to place before the Grand Jury any evidence he might have as to the guilt of this defendant and others (all of whom he named) of the offense of obstructing and conspiring to obstruct justice in the Federal Court; that, by this charge, the rights of the defendant were prejudiced and his constitutional right, not to be prosecuted for an infamous crime except upon an indictment returned by Grand Jury free from prejudice or coercion and upon legal and competent evidence, was violated.

Continuing his charge to the Grand Jury, His Honor Judge Otis, mentioning the defendant by name, in effect told the Jury that the defendant had entered into a conspiracy to obstruct justice in the Federal court in connection with the insurance cases pending therein. He detailed to the Jury as established facts the minutest details of the alleged conspiracy, saying in effect that the defendant was guilty of conspiring to obstruct and of obstructing justice in the Federal court in connection with said insurance litigation.

His Honor Judge Otis, in the course of his charge, said that some three days before

His Honor Judge Stone had made his request to the U.S. District Attorney, as hereinbefore stated, the defendant T. J. Pendergast and one R. E. O'Malley had plead guilty in the Federal Court to income tax evasion and had been sentenced therefor; that in so doing his Honor Judge Otis prejudiced the rights of this defendant in placing before the Jury prejudicial and inflammatory matter calculated to prejudice the defendants in the minds of the Jury and to move and induce it to return an indictment against the defendants.

In the further course of his charge, His Honor Judge Otis told the Jury that he assumed that they had read the newspapers and that they had read therein that certain lawyers, unnamed in said articles, had made the claim that the three-year statute of limitation applied and barred the prosecution of this defendant and others. He further stated that the Grand Jury had no right to consider whether or not the statute of limitations had run; that it was no concern of theirs and that they should, and would, not consider the same.

This charge was erroneous and prejudicial in that it ignored and was directly in the teeth of Section 582 of Title 18, U.S.C.A., which provides:

"No person shall be prosecuted, tried or punished for any offense not capital, except as provided in Section 584 of this Title, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed ***."

Notwithstanding the above statement, His Honor Judge Otis charged the Jury that, in his deliberate judgment, the statute of limitations had not run and the prosecution of the defendant was not barred. In explaining this latter statement, he told the Jury, as though it was a proved fact and within his knowledge, that it was part of the conspiracy entered into by the defendant and others that the parties to the conspiracy, including this defendant, should keep it secret and that they should, by affirmative acts, if they were ever called before a Federal official, deny the existence of said conspiracy or their part therein or knowledge thereof. Holding up before the Grand Jury the report of the Special Master appointed by the Court to investigate the facts concerning said insurance cases and the settlement thereof, he told the Jury that, in those volumes was evidence of the fact that such agreement of secrecy and of affirmative acts or denial were contained in said volumes. Said volumes are filed herewith, marked Exhibit A and made a part hereof.

Defendant says that the natural effect of the charge of His Honor Judge Otis to the Grand Jury in this regard was to convince the Jury that the agreement as to secrecy and affirmative acts of concealment were part of the alleged conspiracy and that hence the statute of limitations had not run for the reason that the defendant McCormack had, in carrying out said alleged conspiracy, denied before the Grand Jury, within the three-year period, that there was such a conspiracy or that he had any knowledge thereof and that said denial was an overt act done in furtherance of the conspiracy within the three-year period and hence the prosecution of defendant and others was not barred; that said charge in this regard was highly prejudicial to the rights of the defendant.

Defendant says that many times in his charge to the Grand Jury, Judge Otis called this defendant by name and not only pointed the judicial finger of suspicion at him but, in effect, told the Jury that he was guilty of the offense of obstructing Federal justice and of conspiring so to do.

Defendant further says that, in his charge, to the Grand Jury, His Honor Judge Otis not only placed before it his own belief of defendant's guilt but the opinion and conviction of His Honor Judge Kimbrough Stone that there was reason to believe the defendant guilty of the offense under investigation and charged in this indictment.

Defendant says that said charge, in its entirety and in its constituent parts, was improper, highly inflammatory, argumentative and violative of defendant's rights in that it influenced and persuaded the Jury to return the indictment herein, substituting in that regard the judgment of the Court for the judgment and determination of the Grand Jury, all in violation of Article 5 of the Amendments to the Constitution of the United States of America and defendant's rights thereunder, wherein it is provided that:

"No person shall be held to answer for capital or otherwise infamous crime unless on the presentment of indictment by a Grand Jury; nor shall any person be deprived of life, liberty or property without due process of law."

Defendant further says that the charge of His Honor Judge Otis created, of necessity, such an atmosphere of suspicion, hatred and contempt among the Grand Jurors of and for this defendant as to make it inevitable that the indictment should be returned against him and that such was the direct result of the court's charge.

Defendant further says that the supplemental charge of His Honor Judge Otis to the

Grand Jury on June 25th, 1940, heretofore set out in full herein, emphasized and aggravated the charge theretofore made in that it again called attention of the Grand Jury to what His Honor Judge Kimbrough Stone had said and the fact that his statement had been published over and over again and "was a matter known to everyone in the district and not only that, but that the names of the defendant and his alleged co-conspirators had been blazoned forth in headlines for months and now for years in this connection." He stated to the Jury that it would have been farcical not to have mentioned names and that not to have done so would have been to imitate the ostrich and to suggest that honorable and intelligent Grand Jurors (meaning the jurors whom he was addressing) had no more perception or knowledge than ostriches which hide their heads in the sand.

Defendant respectfully states to the Court that, although in this supplemental charge His Honor Judge Otis told the Jury that they should not return an indictment against the defendant except upon evidence presented to them, yet the whole tenor and effect of such supplemental charge was improper and prejudicial to the rights of this defendant and but emphasized the charge theretofore given.

Defendant further says that the indictment of the defendant by the Grand Jury was the direct result of the unlawful and prejudicial charge of the Court and was in reality an indictment by the Court and not an indictment by a Grand Jury.

II.

For further and additional grounds in support of this plea in abatement, defendant says that the only witness who appeared before the Grand Jury and gave testimony concerning the matters set out in the indictment herein was one A. L. McCormack, one of the defendants herein; that, in the indictment returned against this defendant and others, the defendants are charged with having violated Section 88 of Title 18 U.S.C.A., by entering into a conspiracy to violate Section 241 of Title 18 U.S.C.A.; and it is further charged that certain overt acts set out in the indictment were committed by some one or more of the conspirators for the purpose of carrying the conspiracy into effect; that the indictment, upon its face, shows that all of the said alleged overt acts were committed more than three years prior to the date upon which said indictment was returned, with the exception of the alleged overt acts set out in the indictment numbered, respectively,

therein IX and X; that it is charged in said indictment, among other things, that it was part of the conspiracy alleged to have been entered into by the defendants:

**** that they, the said defendants, and each of them, the said T. J. Pendergast, R. E. O'Malley and A. L. McCormack, would, and did, keep secret all of the fraudulent and corrupt plans, negotiations and agreements hereinbefore described and would and did prevent the said United States District Court from discovering the fraudulent and corrupt means employed by which the said decree of the said U.S. District Court was obtained as hereinbefore set out, and that they would, and did, continue to endeavor to conceal all of the corrupt and fraudulent agreements made by them, hereinbefore described, until all of said causes were finally determined and completely disposed of by the said U.S. District Court, as aforesaid."

That there was no evidence of any kind before the Grand Jury bearing upon or tending to prove the allegations of the indictment heretofore quoted, but said allegations were placed in said indictment, without any evidence upon which to support them, for the purpose of bringing the alleged offense within the statutory period of limitation by alleging that the alleged agreement as to secrecy and concealment was part of the alleged conspiracy and that the offense was consummated within the three-year period by the alleged commission of the overt acts IX and X set out in the indictment.

Defendant says that the alleged overt act, or acts, numbered IX in the indictment are as follows:

"IX. In the early part of March, 1939, the defendant A. L. McCormack appeared before a United States Grand Jury sitting at Kansas City, Missouri, for the Western Judicial District of the State of Missouri, to testify before the said United States Grand Jury concerning the transactions between himself, T. J. Pendergast, R. E. O'Malley, Charles R. Street and any other person or persons unknown to the members of the Grand Jury, in connection with the compromise and settlement of the litigation hereinbefore described, pending in the U.S. District Court. The said A. L. McCormack was called on numerous occasions by the United States Grand Jury sitting at Kansas City in March, 1939, as aforesaid, and between sessions of the Grand Jury was frequently visited by and frequently visited the defendant R. E. O'Malley, on each of which occasions the defendant R. E. O'Malley requested of and importuned the

defendant A. L. McCormack to refuse to disclose and to conceal from the said U. S. Grand Jury all of the fraudulent, corrupt and unlawful transactions between him and the other defendants herein named, and any other person or persons with whom he may have had corrupt, fraudulent and unlawful agreements or negotiations, and not to disclose to the Grand Jury, to the U.S. Attorney or any of his assistants or to any agents of the United States any payment of any money by Charles R. Street to the said A. L. McCormack for delivery to the defendant T. J. Pendergast or the defendant R. E. O'Malley.

Defendant says that there was no evidence adduced before as overt acts the said Grand Jury supporting or sustaining said allegations/and no testimony that any of the acts of either R. E. O'Malley or A. L. McCormack set forth in said alleged overt acts were done in connection with the said alleged conspiracy or for the purpose of carrying it into effect. But, on the contrary, all the evidence before the Grand Jury which returned this indictment and all the facts and circumstances surrounding the testimony of A. L. McCormack before said Grand Jury in March, 1939, were given and done in connection with an investigation into charges of whether or not certain persons, including McCormack, were guilty of income tax evasion.

Defendant says that said allegations as to said overt acts set forth in number X of the indictment under "Overt Acts" were made in said indictment for the purpose of attempting to plead an alleged overt act occurring within three years of the return of the indictment herein and for the purpose of evading the defense of the statute of limitations; that the indictment charges under number X of the alleged overt acts as follows:

"X. That the said A. L. McCormack, so appearing before the U.S. Grand Jury sitting in Kansas City, Missouri, as aforesaid, in March of 1939 in his testimony before said Grand Jury refused time after time to reveal and disclose any of the corrupt, unlawful and fraudulent transactions between himself, Charles R. Street, R. E. O'Malley and T. J. Pendergast, to the United States Grand Jury, and refused to disclose to said Grand Jury the payment of any money or moneys to any person or persons for the purpose of obtaining or influencing the fraudulent and dishonest settlement and compromise of all the litigation pending before the said U. S. Court for the Western Judicial District of the State of Missouri, and that by so refusing to reveal and disclose any of the things

concerning which the Grand Jury inquired but by denying the same said defendant A. L. McCormack committed willful, deliberate and corrupt perjury and continued and kept in force the conspiracy and agreement which had theretofore been entered into between himself, Charles R. Street, R. E. O'Malley and T. J. Pendergast.”

Defendant says that there was no evidence before the Grand as overt acts; Jury on which said allegations could be predicated / that there was no evidence before the Grand Jury to prove that the acts and conduct and testimony of the said McCormack, as set out in said alleged overt acts numbered X in the indictment, had any connection with or in any way tended to carry out or execute the alleged conspiracy set forth in the indictment.

Defendant further says that, if the evidence given by the said A. L. McCormack before the Grand Jury in March, 1939, is produced, and if the evidence of the said McCormack given before the Grand Jury which returned the present indictment is produced, it will be conclusively shown that said testimony did not have any connection with or refer to or concern the alleged conspiracy or any part thereof or any alleged overt act.

Defendant says that, in order to charge and prove an offense against this defendant and others, it was necessary to allege and prove the formation of the conspiracy to violate Section 88 of Title 18 U.S.C.A. to commit an offense against the United States in violation of Section 241 of Title 18 U.S.C.A. and the commission of an overt act within a period of three years prior to the day on which the indictment was returned; that there was no testimony presented to the Grand Jury which returned the indictment in this case showing, or tending to show, the commission of any overt act by any of the alleged conspirators within the three-year period prior to the date upon which the indictment was returned, for the purpose, or having the effect of aiding and carrying out said conspiracy; that the allegations in said indictment as to secrecy and concealment, being part of the alleged conspiracy and the charging of the overt acts numbered IX and X, were wholly unsupported by any evidence before the Grand Jury and were placed in said indictment for the sole purpose of attempting to evade the statute of limitations. Defendant says that there was no evidence before the Grand Jury tending to prove that any overt act was committed within a period of three years prior to the return of the indictment.

Defendant says that all of the matters concerning the testimony of A. L. McCormack

before the Grand Jury and all of the facts and circumstances surrounding the presentation of the evidence to the Grand Jury are within the knowledge of the Honorable Richard F. Phelps, Acting U.S. District Attorney, and Miss Vivian Krimminger, both of whom were present throughout the taking of all of the testimony adduced before the Jury; that Miss Krimminger took said testimony in shorthand and later transcribed her notes upon the typewriter; that a full and complete transcript of the testimony before the Grand Jury is in existence and can be produced by the U. S. District Attorney; that said testimony, if produced, will show that there was no legal and competent evidence justifying the return of the indictment herein.

In this connection, defendant respectfully requests the Court that evidence be taken touching the matters here set forth and that the United States District Attorney be requested to inform the Court as to all the testimony given before the Grand Jury, and that a sub poena duces tecum issue to Miss Krimminger, ordering her to bring her notes of said testimony with her and produce it for examination by the Court and counsel.

WHEREFORE, this defendant prays that said indictment be abated for all time and held for naught and that this defendant be forever discharged.

John G. Madden

RR Brewster

Attorneys for Defendant, T. J. Pendergast.

STATE OF MISSOURI)

) SS:

COUNTY OF JACKSON)

T. J. PENDERGAST, of lawful age, upon oath states that he is one of the defendants in the aboveentitled cause; that he has read the above and foregoing Plea in Abatement and that the facts set out therein are true.

T. J. Pendergast

Subscribed and sworn to before me this 6th day of September 1940. My commission expires March 26, 1944.

Ella M. Sprague

Notary Public, said County and State.

No. 14,912

IN THE U.S. DISTRICT COURT FOR THE WESTERN DIVISION OF THE WESTERN
DISTRICT OF MISSOURI

UNITED STATES OF AMERICA, Pltf.,

vs

T. J. PENDERGAST, R. E. O'MALLEY, A. L. McCORMACK, Defts.

SEPARATE PLEA IN ABATEMENT OF DEFENDANT, T.I.PENDERGAST.

John G. Madden,

R. R. Brewster,

Attys for Deft-T.J.Pendergast.

Re-FILED SEP 9 1940

A. L. ARNOLD, Clerk

By Dan C Kelbher, Deputy

FILED SEP 6 1940

A. L. ARNOLD, Clerk

By M.C. Hawkins, Deputy