

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

UNITED STATES OF AMERICA, Plaintiff,

v.

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

No. 14,912

PLEA IN ABATEMENT.

Comes now A. L. McCormack, one of the defendants in the above entitled cause, and moves the Court to abate and for naught hold the indictment by the Grand Jury in the above cause for the following reasons, to wit:

(1) That the Court in its charge to the Grand Jury so abused its (the Court's) discretion that the charge taken as a whole was an order and a direction to the said Grand Jury to return an indictment against this defendant and each of the defendants and was such a usurpation of the province and function of the Jury that the Indictment returned is not the result of the free and untrammelled deliberation and judgment of the Jury but is the result of coercion by and direction by the Court.

(2) That the Court repeatedly stated to the Grand Jury that it was the Court's opinion that the defendant and each of them were guilty of the crime of impeding and obstructing justice, were guilty of the crime of conspiracy to defraud the United States, were guilty of the crime of conspiracy to impede and obstruct the administration of justice, and were guilty of an "outrageous contempt" on the three-Judge Federal Court at a time when the three-Judge Federal Court were considering in equity cases 270 to 426, both inclusive, mentioned in the indictment.

(3) That the Court in flagrant abuse of discretion singled out by name each of the defendants herein and said in substance that there was ample evidence of the guilt of each of the defendants.

(4) The Court in substance stated in its charge that there was sufficient evidence to warrant an indictment and the legal effect of these statements is and was that it took from the - Grand Jury the right to determine that question and also the determination of the question of whether a crime had been committed; that the repeated statements of the Court "that the evidence will show" implanted in the minds of the said Grand Jury that the Court had formed a considered opinion of the guilt of the defendants and as a consequence the Jury regarded this as a commission and order to indict the defendants.

(5) That the Court in its charge to the Jury in effect ordered and directed the Grand Jury to indict, thereby invading the province of the Grand Jury.

(6) That the Court specifically directed the attention of the Grand Jury to the defendant by name.

(7) That the Court by its repeated statements that an "outrageous contempt" had been committed on the three-Judge Court by the defendants filing or causing to be filed a stipulation upon which the Court acted in granting a decree so influenced and inflamed the mind of the Jury against this defendant and each of the defendants when there was no competent evidence before the Jury to warrant the inference that this defendant filed or caused to be filed any stipulation with the three-Judge Court or acquiesced in the filing of any stipulation with said Court that the indictment returned is not the free and untrammelled act and judgment of said Grand Jury.

(8) The Court when it stated, to the Grand Jury "everybody knew what was in mind" when the three-judge Court through its presiding judge gave directions to the United States Attorney to cause steps to be taken to cause to be cited before that Court for contempt of Court any individual who the United States Attorney's investigation would show had been guilty of contempt, and also called upon the said attorney to present to the Grand Jury any evidence he might be able to gather which would tend to show the crime of obstructing the administration of justice in the Federal Court had been committed. What the Court had in mind and as it emphatically stated was -

"that they (Robert Emmet O'Malley and Thomas J. Pendergast) 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."

Again referring to the three-Judge Court speaking through its presiding judge, Judge Otis stated that that Court had in mind "that an outrageous contempt had been committed against the Court and that there had been committed also the offense of obstructing justice against the laws of the United States."

Again referring to the three-Judge Federal Court, Judge Otis stated:

"The matter that was primarily before the Court was how the fund should be distributed, since it had been developed that fraud had been practiced upon the Court."

Judge Otis again referring to what was stated by the three-Judge Court, said:

"It is apparent from the statement of counsel upon both sides here (equity cases pending before three-Judge Court) 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."

Judge Otis again referring to the statement of the presiding judge of the three-Judge Court continued:

"but In view of the situation which is presented by this record (testimony taken by Special Master) under appointment by the three-Judge Court), we request and urge the Acting United States Attorney in this District to place before the next Grand Jury 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 others for violation of these acts."

The foregoing clearly Indicates that Judge Otis was telling the Jury that the three-Judge Federal Court and the attorneys in the civil cases were all of the opinion that the defendants herein were guilty of an "outrageous contempt", and also of the crime of obstructing justice, thereby in substance arguing the case to the Grand Jury and urging the return of an Indictment.

(9) Judge Otis charged the Grand Jury:

"I charge you that if the 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 endeavor 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 (Judge Otis) 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 the evidence points, one person or two persons or three persons or one hundred persons." Judge Otis by these remarks in substance told the Jury that the facts of the commission of the crime under Section 241, Title 18 of the Code and the "outrageous contempt" which the three-Judge Court had stated through its presiding judge had been practiced upon it, were one and the same state of facts. Judge Otis, after telling the Jury that the three-Judge Court were of the opinion that an outrageous contempt had been committed upon the Court, further joined the crime of contempt and the crime of conspiracy to violate Section 241 of Title 18 in the following language:

"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 the 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 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 offense against the laws of the United States all parties shown to have so conspired."

thereby advising the Grand Jury that the three-Judge Court had concluded that a contempt upon it had been committed in the manner and form just stated and consequently the defendants were guilty of the crime of conspiracy to obstruct justice (Section 241, Title 18).

(10) The Court in its instruction to the Jury overstepped the bounds of all reasonable discretion when he argued with the Jury and expounded to the Jury as his "considered opinion" that the statute of limitations did not apply to "bar the prosecution of the matters which I have stated to you are submitted to you for your consideration." This quoted statement of the Court in substance told the Jury that the defendants practically admitted a violation of the law but would avoid being tried for same by pleading the statute of limitations.

(11) The Court violated all canons of discretion and in substance ordered and

directed the Jury to return an indictment against the defendants herein when he stated:

"I have no doubt, that the last payment of the bribe money in connection with the insurance litigation was on October 25, 1956. \*\*\* But the last act in the offense 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 any mere rumor. Here (pointing to many bound volumes then resting on the Court's desk) is the evidence that was taken before the Master appointed by this Court, 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, 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."

By the language in this paragraph the Jury were directed to return an indictment and were deprived of their lawful right and function to determine from evidence presented whether a crime had or had not been committed. The Jury was also coerced because the Court in substance told them that he had read and re-read the report and was satisfied that a crime had been committed.

(12) The Court overstepped the bounds of reasonable discretion and inflamed the minds of the Jury by stating in substance that there was impounded and in the custody of the Court a fund of \$8,000,000; if the Insurance Companies lose the equity cases (rate cases) the Insurance Companies would get none of this \$8,000,000 fund, by saying to the Jury:

"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 per cent of the fund now rather than to run a chance of getting none of it. The evidence will prove that."

The quoted remarks in this paragraph contained amount to argument and an improper interference with the functions and province of the Jury.

(13) The Court violated all reasonable discretion when he named the three defendants and argued the alleged motive of the Insurance Companies and their agent, in this;

"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 Company 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 he said he thought he could obtain a settlement of this litigation whereby the Insurance Companies will get eighty per cent. 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 (pointing to the volumes on his desk containing testimony before the Special Master) is submitted to you, between Street and at least three others, those who were named by the three-Judge Court (O'Malley, Pendergast, McCormack). 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 false representations to the Court that there had been an honest settlement, to obtain a decree from the Court giving eighty per cent of the money to the Insurance

Companies."

The foregoing quote is an invasion of the province of the Grand Jury, is argumentative and intended to influence the Jury and to compel the return of an indictment against these defendants.

(14) The Court by the remarks hereinbelow set forth in the indented paragraphs went beyond all reasonable discretion and entered into the field of argument and thus biased and prejudiced the minds of the Grand Jury against the defendants and so inflamed the minds of the Grand Jury that the indictment here- in returned is not the result of the free and untrammelled deliberation and judgment of the Grand Jury, in this: "But that was not all of the conspiracy which the evidence will show. \*\*\*. The conspirators knew if the court had the slightest inkling that the settlement was the result of bribery and corruption the decree would not be entered \*\*\*

"They conspired together not only that they would obtain a decree from the court but they would by affirmative acts, prevent the court ever from discovering 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 \*\*\* The evidence will show it, if it is the same evidence that is in these books (indicating volumes containing evidence taken before Special Master), if it is the same evidence that I know may be produced. The evidence will show that conspirators agreed not only that the money should be paid to the Superintendent of Insurance \*\*\* that this man Street should conceal from his principals, the Insurance Companies, what this money was being used for \*\*\*; 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 it should be done this way, that he should say to them, 'gentlemen, I need one hundred thousand, two hundred thousand, three hundred thousand, from the Insurance Companies \*\*\*. I (Street) want it for legitimate expenses, for legal expenses \* \* \* The evidence will show that he (Street) never did make the accounting, that he continued affirmatively to decline to furnish an accounting although he 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 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 of the Court and to make it impossible that the Court would learn the truth. They agreed to that. The evidence will show that."

WHEREFORE, the premises considered, this defendant respectfully urges the Court to sustain this his plea in abatement and to quash and for naught hold the indictment herein, and that he be discharged therefrom.

Respectfully submitted,

James Carroll St. Louis Mo.

Forest W Hanna Kansas City Mo.

Attorney for A. L. McCormack

Re-FILED SEP 9 1940

A. L. ARNOLD, Clerk

By Dan C. Kelliher, Deputy

In the U. S. Dist Court for the Western Div of the Western Dist of Mo.

U. S. PI.

vs

T. J. Pendergast et al., Def

No 14,937

Plea in Abatement

FILED SEP 6 1940

A. L. ARNOLD, Clerk

By AL Arnold, Clerk

James Carroll

Forest W Hanna

Attys for A. L. McCormack