Brewster, Brewster & Brewster
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Kansas City, Mo.
VI CTOR 4411
September 10th, 1940.
Honorable A. Lee Wyman, Federal Bldg.,
Kansas City, Missouri.
Re: U. S. vs Pendergast, et al Nos. 14912, 14957.
Dear Judge Wyman:-
By your indulgence these cases were argued at length yesterday and we know that you do not desire to be burdened by briefs after that oral argument. We are, therefore, submitting merely the following memorandum:
1.

The charge to the Grand Jury manifestly requires an abatement of the indictments, for the following reasons:

(a) It brought to the attention of the Jury other criminal proceedings where pleas of guilty were entered and thereby prejudicially introduced the defendants to the Grand Jury as self-confessed felons;

(b) It brought Judge Kimbrough Stone before the Grand Jury, both as a witness and as an advocate in favor of indictment, by quoting his statement in another and entirely independent proceeding wherein he assailed the defendants as guilty both of an outrageous contempt and also of an obstruction of justice;

(c) It named the defendants, stated unambiguously that evidence of their guilt was available, and charged unmistakably that they were in fact guilty of the offenses for which they were indicted;

(d) It directed the Jury to ignore the issue of limitations, both upon the theory that that issue was not for their consideration and also upon the further theory that, under the facts, prosecution was not barred, although under the statute this issue was necessarily one for their consideration;

(e) It charged the Jury affirmatively that all facts essential to the established guilt of defendants were disclosed in the testimony taken before the Special Master, including

the special agreement to conceal the existence of the alleged conspiracy by subornation of perjury and perjury, which was relied upon by the Court and by the Grand Jury in returning indictments to avoid the bar of the statute of limitations, when in fact there was no such evidence contained in the volumes of the record to which reference was made, this misstatement aggravating the error of such reference.

Consequently the court, in instructing the grand jury, should refrain from giving an inflammatory or prejudicial charge, and confine itself to a definition of the duties of the grand jury, calling its attention to crimes generally, but refraining from expressing any opinion as to the guilt or innocence of any particular person.

It is believed that any intimation by the court that a particular person has been guilty of any particular crime, or that evidence can easily be found which will convict him, or that the grand jury should indict him, would vitiate an indictment on proper objection."

12 R.C.L., Sec. 24, p. 1040.

"*** However, it has been held to be a manifest abuse of discretion for the court in its charge to the grand jury to express an opinion as to the guilt or innocence of a person accused of crime to be investigated, to express an opinion that there is evidence warranting the indictment of parties for violation of particular laws, or specifically to direct the attention of the grand jury to any named person as a subject for investigation. And the court should not in its charge assume the function committed by law to the grand jury of determining that a crime has been committed."

28 C.J., Sec. 59, p. 786.

"*** Independence of the grand jurors must, of course, be preserved. The judge did not mention any of these defendants, and his remarks were against the crime by whomever committed. 'It is the province of the circuit judge and his duty to inveigh against crime of all kinds and in every quarter, but it is a usurpation of power to denounce individuals, or to specifically direct the attention of the grand jury to any named person.' Puller vs State, 85 Miss. 199, 37 So. 749, 750."

Walker vs U.S. (CCA 8) 93 F.(2d) 383, 390.

"All this without overlooking the fact that the jurors testified that they were not influenced by what occurred; but this is hardly possible. We have seen that they were by some method induced to do that which the evidence, or rather want of evidence, before

them could not justify; and the fact that the prosecutor at the conclusion of his address told them in effect that they were the judges of the matter did not withdraw from them the influence and effect of his remarks, nor restore that unbiased equipoise which, from the time of the institution of the grand jury system, has been one of its principal features. Whether the defendants should in fact be brought to trial is not the question. It is whether they should be brought to trial in the manner provided by law, and whether their substantial rights have been invaded. There is no surer road to anarchy than for the courts to assume legislative power by stretching statutory enactments and importing into them penalties not fixed by law, or to extend procedure to such an extent as to invade constitutional rights." U. S. vs Wells, 163 Fed. 313, 329.

U. S. vs Buck, 18 F. Supp. 213, 219-220;

Clair vs State, 40 Nebr. 534, 59 N.W. 118, 28 L.R.A. 367;

State vs McCoy, 89 Ind. App. 330, 166 N.E. 549; Blake vs State, 54 Okla. Cr. 62, 16 P.(2d) 240; People vs Both, 193 N.Y.S. 591;

Fuller vs State, 85 Miss. 199, 37 So. 749;

State vs Will, 97 Ia. 58, 65 N.W. 1010;

Coleman vs State, 6 Okla. Cr. 252, 118 P. 594, 605; Com. vs Bannon, 97 Mass. 214;

Blau vs State, 82 Miss. 514, 34 So. 153, 155.

The Indictments must be abated since there was no evidence before the Grand Jury of an essential element of the offenses charged, namely, an overt act occurring within the period of the statute of limitations. For a conspiracy prosecution, there must be proof of such an act committed within such period. No act is an overt act unless it is done pursuant to and in furtherance of the conspiracy or agreement. Lonabaugh vs U.S., 178 Fed. (CCA 8) 476, l.c. 478. Such an overt act must be a "positive rather than a passive one". Lonabaugh vs U.S., supra. Two purported overt acts within such period are charged in the indictments, namely, that, in an investigation of charges against them for income tax evasion, one of the defendants committed perjury and another of the defendants suborned perjury. Both the Court in his charge to the Grand Jury and the Grand Jury in returning indictments recognized that such alleged acts could not serve as overt acts to toll the statute of limitations unless, as part of the original conspiracy, there was an agreement to commit acts of that character. The mere conspiracy, itself, could

give rise to no inference of such an agreement. The mere commission of the acts could give rise to no inference of such an agreement. As a result proof was essential. There was no such proof before the Grand Jury. Brady vs U.S,, 24 Fed.(2d) (CCA 8) 405. It may be noted that concealment of the existence of a conspiracy cannot be distorted into the claim of a continuance of that conspiracy for the purpose of tolling the statute of limitations. Hart Inv. Co. vs Great Eastern Oil Co., 27 Fed. Supp. 713, 716.

Counsel for all defendants participated in the preparation of this memorandum, and we are authorized on behalf of counsel for the other defendants to state that they concur therein and join in its submission. This is done in the interests of brevity and to relieve the Court from the burden of a duplication of memoranda.

Very truly yours,

RR Brewster

R. R. Brewster

John G. Madden

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Attorneys for Defendant, T.J. Pendergast.