No.

IN THE

Supreme Court of the United States

CHRISTOPHER CARROLL AND
WHISKEY DIX BIG TRUCK REPAIR, LLC,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Fifth Amendment guarantees that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury. That guarantee carries constitutional substance and "cannot mean less today than [it] did the day [it was] adopted." *United States v. Haymond*, 588 U.S. 634, 642 (2019).

Circa 1791, Justices traveling circuit, contemporary legal scholars, popular legal publications and courts throughout the new republic were all rejecting probable as the appropriate grand jury standard of proof and articulating a much higher standard. These contemporaneous authorities establish that the standard required for a grand jury indictment was substantially higher than probable cause when the Fifth Amendment was adopted.

This Court has never directly resolved the constitutionally required standard for the grand jury. Rather than applying the historical record, the Eighth Circuit declared itself bound by dicta in later decisions of this Court and held that a grand jury may indict upon a mere finding of probable cause. That holding contravenes the original public understanding of the Grand Jury Clause and weakens a foundational constitutional protection. Petitioners' case presents the question as a pure legal issue, properly preserved and clearly presented for this Court's review.

The Question Presented is:

1. Whether the Eighth Circuit erred in holding that the Fifth Amendment permits a grand jury to indict on a finding of probable cause—contravening the original public understanding of the Grand Jury Clause.

PARTIES TO THE PROCEEDINGS

Petitioners are Christopher Carroll and Whiskey Dix Big Truck Repair, LLC. Petitioners were defendants-appellants below.

Respondent is the United States of America, which was the plaintiff-appellee below.

CORPORATE DISCLOSURE STATEMENT

Petitioner Carroll is an individual. Whiskey Dix Big Truck Repair, LLC is fully owned by the Avery Trust; it has no parent corporation, and no publicly held company owns 10 percent or more of its stock. The trust has no publicly traded affiliates. Whiskey Dix Big Truck Repair, LLC and Avery Trust do not have stock ticker symbols.

STATEMENT OF RELATED PROCEEDINGS

United States v. Christopher Carroll and Whiskey Dix Big Truck Repair, LLC, No. 4:21-cr-00532, U.S. District Court for the Eastern District of Missouri. Judgment entered Feb. 11, 2025.

United States v. Christopher Carroll and Whiskey Dix Big Truck Repair, LLC, No. 25-1396, U.S. Court of Appeals for the Eighth Circuit. Judgment entered February 11, 2026.

Now pending before the Eighth Circuit is an appeal by Petitioner Carroll and his wife (who is not a party to this certiorari petition) concerning the government's attempt to execute the restitution order in the underlying criminal matter (No. 4:21-cr-00532, U.S. District Court for the Eastern District of Missouri). The appeal is *Christopher Carroll, et al. v. United States*, No. 25-2872, U.S. Court of Appeals for the Eighth Circuit. The matter is briefed, but not submitted.

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PETITION FOR A WRIT OF CERTIORARI

Christopher Carroll and Whiskey Dix Big Truck Repair, LLC, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS AND ORDERS BELOW

The Eighth Circuit's opinion is reported at *United States v. Christopher Carroll and Whiskey Dix Big Truck Repair*, 167 F.4th. 483 (8th Cir. 2026). Judgment in the matter was entered on February 11, 2026. The opinion is reprinted in the Appendix at 1a-13a. The Eastern District of Missouri's judgment in *United States v. Christopher Carroll and Whiskey Dix Big Truck Repair*, No. 4:21-cr-00532, was entered on February 11, 2025.

The district court's April 10, 2024 order denying Petitioners' motion to dismiss for lack of jurisdiction is unreported, but is available at 2024 WL 3566635. It is reprinted in the Appendix at 14a-26a.

JURISDICTION

The United States District Court for the Eastern District of Missouri had jurisdiction under 18 U.S.C. § 3231, and entered judgment on February 11, 2025. The Eighth Circuit had jurisdiction under 28 U.S.C. § 1291, and affirmed Petitioners' convictions by panel opinion on February 11, 2026. Rehearing was not sought. On March 24, 2026, this Court granted Petitioners until July 11, 2026 to file their Petition for a Writ of Certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury. . . ." U.S. Const. amend. V.

INTRODUCTION

At the time the right was enshrined in the Constitution, it was understood that a grand jury should issue an indictment only if it was convinced of the defendant's guilt far beyond a mere probability. Indeed, the higher standard of proof was considered essential to the efficacy of the fundamental right, as it balanced the prosecutor's one-sided presentation of the evidence. As one law professor has explained, "the historic tradition of hearing only the prosecutor's evidence went hand-in-hand with, and was integral to, a far higher evidentiary standard than the modern test of probable cause." "[T]he grand jury only heard from the prosecutor; but the grand jury rigorously evaluated the prosecutor's evidence using a standard akin to the trial jury's reasonable doubt standard." Niki Kuckes, *Retelling Grand Jury History, in* Grand Jury 2.0: Modern Perspectives on the Grand Jury, at 125, 143-46 (Roger Anthony Fairfax, Jr. ed. 2011).

From the era when Justices travelled the circuits, there appears to be no record of any Justice instructing a grand jury to apply a mere probable cause standard. On the other hand, Justice Wilson charged the grand jury in 1790 as follows: "Ought not moral certainty to be deemed

the necessary basis . . . ?"[1] He condemned the "probable cause" doctrine of decades earlier in the strongest possible terms:

> The doctrine, that a grand jury may rest satisfied merely with probabilities, is a doctrine, dangerous as well as unfounded: It is a doctrine, which may be applied to countenance and promote the vilest and most oppressive purposes: It may be used, in pernicious rotation, as a snare, in which the innocent may be entrapped, and as a screen, under the cover of which the guilty may escape.[2]

Justice Wilson was not alone in identifying a higher standard of proof. Justice Iredell in 1791 and 1798, Justice Chase in 1800, Justice Taney in 1836, and Justice Field in 1872 each instructed grand juries that a higher standard was required.

In *Probable Cause Revisited*, 68 Stan. L. Rev. 511 (2016), Professor William Ortman concluded that "among the American judges of the Founding generation who expressed a view, Justice Wilson's position—that a grand jury should return an indictment only upon an evidentiary showing more demanding than probable cause—dominated." *Id.* at 520.

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1. James Wilson, *Charge to the Grand Jury of the Circuit Court for the District of Pennsylvania (April 12, 1790), in* 2 The Documentary History of the Supreme Court of the United States, 1789-1800 at 36 (Maeva Marcus, ed., 1988) (hereinafter "Documentary").

2. *Id.*

The most prominent legal scholars of the time also discussed the application of a higher grand jury standard of proof. As the Southern District of New York recognized, "Lord Hale, Blackstone, and Chitty, in adverting to the ancient dogma that the grand jury ought to find the bill where there is probable evidence to support it, . . . have all recommended a more merciful view of the subject, and, considering the ignominy, the dangers of perjury, the anxiety of delay, and the misery of a prison, insist that the grand jury should be well convinced of the guilt of the accused before subjecting him to a trial." *United States v. Mackenzie*, 30 F. Cas. 1160, 1160-61 (S.D.N.Y. 1843).

William Blackstone explained that the grand jury was to be "thoroughly persuaded of the truth of an indictment." 4 William Blackstone, Commentaries on the laws of England 303 (11th ed., London 1791). Joseph Chitty wrote that "the grand inquest ought, as far as the evidence before them goes, to be convinced of the guilt of the defendant." 1 Joseph Chitty, A Practical Treatise on the Criminal Law *318 (Phila. 1819).

This contemporary understanding should define the standard under the Fifth Amendment's Grand Jury Clause. This Court has never held that a lesser standard satisfies constitutional requirements. As the Court has reiterated, the Bill of Rights "must provide *at a minimum* the degree of protection it afforded when it was adopted." *United States v. Jones*, 565 U.S. 400, 411 (2012) (emphasis in original). The relevant historical evidence demonstrates that the probable cause standard is contrary to the "public understanding" of grand jury proceedings circa 1791, and is therefore contrary to the proper scope of the Fifth Amendment.

In this case, Petitioners argued that the indictment charging them should be dismissed because the grand jury was instructed to apply the probable-cause standard of proof. Both the district court and the Eighth Circuit rejected that argument. In doing so, the Eighth Circuit refused to interpret the Fifth Amendment's Grand Jury Clause according to the contemporary understanding at the time of its adoption. Instead, the court considered itself bound by dicta in later decisions of this Court, which it read to mandate approval of the lesser standard. Similarly, other lower courts seemingly presume probable cause to be the supposedly established standard without a critical look or any analysis, as grand juries across the country are instructed to apply the constitutionally deficient probable cause standard of proof without correction or even acknowledgement.

The fundamental question presented here—is the proper constitutionally required standard of proof for a federal grand jury a higher standard than probable cause?—has never been presented before to this Court. And the brief references in dicta to probable cause in the cases cited by the Eighth Circuit do not control the constitutional issue presented here for several reasons.

First, the cases do not purport to address—much less resolve—the question of the constitutionally mandated standard of proof for grand jury proceedings. There, the question was not raised or argued by the parties, and it was never analyzed by this Court. As such, the references to probable cause are not precedent. *See Oklahoma v. Castro-Huerta*, 597 U.S. 629, 645 (2022) ("[T]he Court's dicta, even if repeated, does not constitute precedent[.]"); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 548

(2013) (identifying dicta and explaining that "the point before us now was not then fully argued; we did not canvas the considerations we have here set forth").

Second, the cited cases were decided well after the Fifth Amendment was adopted and, as such, do not provide insight into the contemporary understanding of grand jury practice. The earliest decision cited by the Eighth Circuit, *Ex Parte Bain*, 121 U.S. 1, was issued in 1887—almost a century after the Bill of Rights was added to the Constitution—and the other cases were decided decades later. "Late-19th-century evidence cannot provide much insight into the meaning of the [] Amendment when it contradicts earlier evidence." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 66 (2022). *See also Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 482 (2020) (finding that a practice that "arose in the second half of the 19th century" does not "inform our understanding of [an Amendment]"); *United States v. Rahimi*, 602 U.S. 680, 738 (2024) (Barrett, J., concurring) ("[E]vidence of 'tradition' unmoored from original meaning is not binding law.").

Finally, and most fundamentally, dicta that results in unconstitutional indictments must be corrected because "[t]he Constitution demands more than the continued use of flawed criminal procedures." *Ramos v. Louisiana*, 590 U.S. 83, 114 (2020) (Sotomayor, J., concurring). Dismissal of an indictment is appropriate "'if it is established that [a] violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988). The flaw here—sanctioned by the Eighth Circuit—

resulted in a structurally unsound and unconstitutional indictment that should have been dismissed. And given the nature of the issue and the history of the practice, it is a flaw that will be perpetuated repeatedly without this Court's intervention and correction.[3]

STATEMENT OF THE CASE

In 2021, Petitioner Christopher Carroll was indicted on bank fraud and money laundering charges stemming from an alleged Paycheck Protection Program ("PPP") loan-fraud scheme. On June 7, 2023, the Government obtained a superseding indictment, which added as a defendant a trucking company Carroll managed, Petitioner Whiskey Dix Big Truck Repair, LLC, and included additional counts related to alleged EPA violations and charges of tampering with witnesses related to the EPA counts. There is no dispute the grand juries for both indictments were instructed to use a probable cause standard of proof.

Petitioners filed a motion to dismiss contending the grand jury returned an indictment under an unconstitutional standard of proof, and therefore, the indictment was invalid and a nullity. In their motion, Petitioners presented historical evidence that, at the time the Fifth Amendment was adopted, the standard of proof for a grand jury was much higher than probable cause. Petitioners argued that the "original public meaning" of the protection afforded by the Grand Jury

3. This issue will not result in a multitude of retroactive litigation. *Edwards v. Vannoy*, 593 U.S. 255, 272 (2021) ("New procedural rules do not apply retroactively on federal collateral review. The watershed exception is moribund.").

Clause defined the scope of the right, and, therefore, the applicable standard of proof should be pegged to the public understanding of grand jury practice when the Bill of Rights was adopted in 1791. In opposition, the Government offered no historical evidence as to the grand jury practice circa 1791 and instead cited dicta from this Court's opinions issued almost a century (or more) after the Fifth Amendment was adopted.

The magistrate judge issued a report recommending that the district court deny the motion. Over Petitioners' objections, the district court adopted the report and recommendation. But the court recognized the strength and impact of the historical evidence and the fact that this Court has never rejected the historical standard nor directly held that probable cause was the appropriate standard of proof, noting: "[Petitioners] rely on creditable sources and a reputable interpretive methodology, and the Government has not identified any case that squarely rejects their historical claims or their legal argument." App. at 22a. The Eighth Circuit denied Petitioners' request for interlocutory appeal on the issue.

After a five-day trial, Defendant Carroll was convicted on seven counts of fraud in connection with obtaining PPP funds, as well as sixteen counts of tampering with a Clean Air Act monitoring device and two counts of witness tampering. Defendant Whiskey Dix Big Truck Repair was convicted on the Clean Air Act charges. Carroll received a 108-month sentence; Whiskey Dix Big Truck Repair received probation.

On appeal, the Eighth Circuit affirmed the convictions. *United States v. Carroll, et al.*, 167 F.4th 483 (8th Cir.

2026). As they did before the district court, Petitioners argued that the indictment violated the Fifth Amendment because the contemporary understanding in 1791 required that the grand jury apply a higher standard of proof than probable cause. In response, the Government again offered no relevant contrary historical evidence as to the common understanding at the time the Amendment was adopted. Instead, it relied primarily on dicta from decisions of this Court almost a century after the Amendment's adoption (or later).

In affirming the convictions, the Eighth Circuit rejected Petitioners' argument that the applicable standard for the grand jury is higher than probable cause. The court noted that "[w]hile the Constitution mandates the initiation of federal prosecution through a grand jury, it does not provide the standard under which a grand jury should return an indictment." App. at 7a. The court did not identify any evidence that contradicted Petitioners' extensive discussion of the historical evidence showing probable cause was not the standard of proof circa 1791. Instead, it relied on much later cases where this Court referenced a probable cause standard in dicta. App. at 7a-9a. As to Petitioners' argument that such citations were merely dicta, the court stated:

> Insofar as [Petitioners] assert that the Supreme Court has never addressed the question precisely as they raise it here, the claim does not change our analysis. Even if the Supreme Court has not made an express holding about the probable cause standard, appellate courts should afford deference and respect to Supreme Court dicta, . . . and we must respect

> the language used by the Supreme Court . . . regardless of whether it is controlling.

App. at 9a (quotations and citations omitted).

REASONS FOR GRANTING THE WRIT

Rule 10 recognizes that some cases require this Court's review, not because of an embedded conflict in the lower courts, but because the federal issue presented is of such importance and the circumstances are such that the issue needs to be—but has not been—settled by this Court. This is that case. U.S. Sup. Ct. R. 10(c). In giving no weight to the significant historical evidence discussed below that should define the proper grand jury standard, and relying incorrectly on dicta, the Eighth Circuit wrongly decided a critically important question of federal law and endorsed a standard that has indisputably weakened the protections of a fundamental right. That issue has never been addressed by this Court, and review is needed to prevent the perpetuation of a flawed constitutional procedure that only this Court can remedy.

I. The Eighth Circuit Wrongly Decided an Important Constitutional Question.

The proper standard of proof is one of the most fundamental aspects of the Fifth Amendment's grand jury protections. The Eighth Circuit, without addressing the unrefuted historical evidence of a higher standard, interpreted the Fifth Amendment's Grand Jury Clause as requiring no more than mere probable cause based on dicta. The appropriate standard raises an important question of federal law which demands adherence to

this Court's established principles of constitutional interpretation.

A. The Importance of the Grand Jury's Historically Higher Standard.

Justice Joseph Story called the grand jury "a great security to the citizens against vindictive prosecutions." *See* 3 Joseph Story, Commentaries on the Constitution of the United States § 1779 (1833). The grand jury's "constitutional mission" was to serve "as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity." *United States v. Dionisio*, 410 U.S. 1, 17 & n. 15 (1973); *see also Wood v. Georgia*, 370 U.S. 375, 390 (1962) (describing indictment by grand jury as "a primary security to the innocent against hasty, malicious and oppressive persecution"). The Framers proposed, and the state ratifying conventions adopted, the Grand Jury Clause with almost no debate—the need for protection by a grand jury did not require much discussion.

Yet, as the American criminal justice system has developed, "[t]he grand jury [has] not always serve[d] its historic role. . . ." *Dionisio*, 410 U.S. at 17. "It is, indeed, common knowledge that the grand jury, having been conceived as a bulwark between the citizen and the Government, is now a tool of the Executive," *id.* at 23 (Douglas, J., dissenting), as numerous courts have recognized for years. *See, e.g.*, *United States v. Ross*, 412 F.3d 771, 774 (7th Cir. 2005) ("Realistically, federal grand juries today provide little protection for criminal suspects whom a U.S. Attorney wishes to indict."); *United States*

v. Navarro-Vargas, 408 F.3d 1184, 1195 (9th Cir. 2005) ("[M]any criticize the modern grand jury as no more than a 'rubber stamp' for the prosecutor."); *Tyson v. Trigg*, 50 F.3d 436, 441 (7th Cir. 1995) ("Instances in which grand juries refuse to return indictments at the request of the prosecutor are almost as rare as hen's teeth."). Even Department of Justice attorneys have said as much: "[t]he government points to the practical reality of grand jury practice, . . . [including] the rarity of a grand jury refusing a prosecutor's requested charge." *United States v. Allen*, 357 F.3d 745, 757 (8th Cir. 2004), *reh'g en banc granted, judgment vacated* (May 11, 2004*), on reh'g en banc*, 406 F.3d 940 (8th Cir. 2005).

Commentators also have frequently criticized "the grand jury's present tendency to rubberstamp the prosecutor's decisions." Peter Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 Mich. L. Rev. 463, 474 (1980); *see also*, Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 Am. Crim. L. Rev. 1, 2 (2004) ("Most knowledgeable observers would describe the federal grand jury more as a handmaiden of the prosecutor than a bulwark of constitutional liberty; to quote the classic vignette, the grand jury is little more than a rubber stamp that would 'indict a ham sandwich' if the prosecutor asked."). Some have even described the "contemporary federal grand jury practice" as an "ongoing national disgrace." Roger Roots, *Grand Juries Gone Wrong*, 14 Rich. J.L. & Pub. Int. 331, 331–32 (2010).

A probable-cause standard for the grand jury—a standard neither called for within the Fifth Amendment

nor what was utilized circa 1791—may be the most significant contributor to the rubber stamp that is today's grand jury. Mere probable cause requires no true evidentiary analysis and promotes full reliance on whatever the prosecutor presents. Returning the grand jury's standard of proof back to its constitutionally elevated level would indisputably reposition the grand jury to better perform its historical function and constitutional mission as a "protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor." *Dionisio*, 410 U.S. at 24 (Douglas, J., dissenting).

B. The Eighth Circuit's Asserted Grand Jury Standard Ignores Established Constitutional Principles.

1. The Scope of the Fifth Amendment Must Be Defined by the Understanding of the Grand Jury Right at the Time of Its Adoption.

As this Court has recognized, "the Constitution's guarantees cannot mean less today than they did the day they were adopted." *United States v. Haymond*, 588 U.S. 634, 642 (2019). Rather, as a written document, the Constitution's meaning cannot change, and "[t]hat which it meant when adopted, it means now." *South Carolina v. United States*, 199 U.S. 437, 448 (1905). The "whole purpose" of a constitution "is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away." Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 40 (1997). And, this is true even if a flawed interpretation has been followed over time. Indeed, the Solicitor General,

just this year, argued that constitutional rights "do not expand or contract because later generations misinterpret them." *Trump v. Barbara*, 2026 WL 252953, at 5 (Brief for the United States) (asking this Court to "restore the [Constitutional] Clause's original meaning").

Based on this fundamental principle, this Court provided a blueprint for determining the scope of the Bill of Rights in *Ramos v. Louisiana*, *supra*. *Ramos* analyzed the Sixth Amendment's right to a jury trial and whether a unanimous verdict—though never referenced in the text—was constitutionally required. In holding that it was, this Court looked to the practice and understanding of the right at the time of the adoption of the Bill of Rights, as evidenced in the common law, founding-era practices, and opinions and treatises written soon afterward. 590 U.S. at 89-90.

That same analysis when applied to the Fifth Amendment grand jury right calls for a higher standard of proof than probable cause. As in *Ramos*, the text is silent as to the applicable standard, but the Amendment's provision of an "indictment of a Grand Jury" "surely meant *something*—otherwise, there would have been no reason to write it down." 590 U.S. at 89. Indeed, that historical understanding is particularly critical for determining the scope of the Grand Jury Clause, given the origin of the right. As then-Judge Learned Hand famously stated: "We took the [grand jury] institution as we found it in our English inheritance, and he best serves the Constitution who most faithfully follows its historical significance. . . ." *In re Kittle*, 180 F. 946, 947 (C.C.S.D.N.Y. 1910). Given the clarity and overwhelming historical evidence, "faithfully follow[ing] its historical significance" requires the recognition of a higher standard of proof.

2. The Historical Evidence Demonstrates that the Fifth Amendment Grand Jury Standard Requires More than Probable Cause To Indict.

The Founders were well aware of the issue regarding the grand jury standard of proof. The question had been vigorously argued in English judicial circles since the 1680s and was a major political dispute between Whigs and Tories in both England and America prior to the American Revolution. Out of this debate arose two possible grand jury standards—a "low" or "probability" standard favored by the Tories and a "high" standard championed by the Whigs. Barbara Shapiro, Beyond Reasonable Doubt and Probable Cause 43, 59 (Berkeley: U. Cal. Press, 1991).

English Whig legal texts and commentaries regarding grand juries circulated widely in colonial America, reflecting the growing concerns colonists had over the Crown's power. In Joseph Chitty's influential treatise, Chitty explained that the former view promoting probable cause as the standard was disfavored and that "great authorities have taken a more merciful view of the subject and . . . have argued that the grand inquest ought, as far as the evidence before them goes, to be convinced of the guilt of the defendant." 1 Joseph Chitty, A Practical Treatise on the Criminal Law 318 (Phila. 1819) (citing influential legal scholars of the times, including Hale and Blackstone).

Similarly, Sir John Somers's highly respected pamphlet on grand juries, Security of Englishmen's Lives, was printed in the American colonies in 1720 and 1773. Somers insisted probabilities must be "banished

from uncorrupted Tribunals as a hinderance unto the discovery of truth."[4] "[S]uspicious and probable causes" must not be permitted to "bring any man's life and estate into danger." *Id.* at 68. *See also* 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN, at 157 n.(a) (Sollom Emlyn ed., 1736) (editor's note explaining that the law of indictments had moved to a higher standard than probable cause, as "a grand jury ought to have the same persuasion of the truth of the indictment, as a petit jury, or a coroner's inquest") (citations omitted).

Aware of the debate and English law, American judges in the Founding era overwhelmingly picked a higher standard of proof than probable cause. The accepted American practice was perhaps best illustrated in the grand jury charges Supreme Court justices of the time gave while riding circuit. These charges were circulated among the citizenry because they were printed in the local newspapers. Justice James Wilson instructed on the "manner[] in which grand juries ought to make enquiries" in 1790.[5] Stressing that the topic "well deserves to be attentively considered," he told the grand jury:

> It has been declared by some, that grand juries are only to enquire, "whether what they hear be any reason to put the party to answer,"—"that a probable cause to call him to answer is as much as is required by law." But, indeed, such

4. JOHN LORD SOMERS, THE SECURITY OF ENGLISHMEN'S LIVES OR THE TRUST, POWER, AND DUTY OF THE GRAND JURIES OF ENGLAND 66 (London 1821).

5. James Wilson, *Charge to the Grand Jury of the Circuit Court for the District of Pennsylvania (April 12, 1790), in* 2 DOCUMENTARY, at 35.

> a declaration is very little consonant to the oath (the best evidence of the law) which every grand juryman is obliged to take. He swears that he "will enquire diligently,"—"that he will present the truth, the whole truth, and nothing but the truth." . . . Ought not moral certainty to be deemed the necessary basis, of what is delivered under the sanction of an obligation so solemn and so strict?[6]

Justice Wilson later delivered the same charge at circuit courts in Virginia, Maryland, and Rhode Island.[7] Importantly, Justice Wilson was recognized by this Court as someone "assumed to have known the current practice."[8]

Justice Iredell followed a similar practice. In 1791, he told a Georgia grand jury, "a *high* probability, *and that alone*, of a person having committed an offence within the Grand Jury's cognizance, can justify their presenting the bill as a true one."[9] And, in 1798, he told a South Carolina grand jury that "the probability should not be a light one, but amounting nearly to a moral certainty."[10]

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6. *Id.* at 35-36.

7. *Id.* at 33.

8. *Hale v. Henkel*, 201 U.S. 43, 61 (1906), *overruled by Murphy v. Waterfront Commission of N.Y. Harbor*, 378 U.S. 52 (1964).

9. *James Iredell's Charge to the Grand Jury of the Circuit Court for the District of Georgia, October 17, 1791*, *in* 2 DOCUMENTARY, at 223 (emphasis added).

10. *James Iredell's Charge to the Grand Jury of the Circuit Court for the District of South Carolina, May 7, 1798*, *in* 3 DOCUMENTARY, at 260.

Other Justices gave similar charges just a few years later. Justice Chase instructed a grand jury in 1800 that:

> every Grand Jury, before they find an indictment, should expect the same proof, and as satisfactory evidenc[e] of the guilt of the accused as the Petit Jury would require to Justify their verdict against him; and, that if the proof should be doubtful, they should not put the party accused to the expence, and disgrace of a trial before the Petit Jury.[11]

In 1836, Chief Justice Taney, who previously served as United States Attorney General, charged a grand jury and identified what he termed the *rule:*

> [I]n every case that may come before you, carefully weigh the testimony, and present no one, unless, in your deliberate judgment, the evidence before you is sufficient, in the absence of any other proof, to justify the conviction of the party accused. . . . [T]his rule is the more proper, because [the accused] is not permitted to summon witnesses or adduce testimony to the grand jury, and your decision must be made without hearing his defence.

Charge to Grand Jury, 30 F. Cas. 998, 999 (C.C.D. Md. 1836) (noting that these duties of the grand jury were common knowledge and that "every citizen summoned

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11. *Samuel Chase's Charge to the Grand Jury of the Circuit Court for the District of Pennsylvania, April 12, 1800, in* 3 DOCUMENTARY, at 409.

as a juror, has a general knowledge of the duties he is called there to perform, **and of the manner in which it is incumbent on him to discharge them**") (emphasis added).

In 1872, Justice Field gave an instruction to a grand jury that this Court recognized as the best illustration of the importance of the grand jury.[12] Like Justice Taney, he recognized the higher standard as the "rule." Directly differentiating from probable cause, he told the grand jury:

> To justify the finding of an indictment, you must be convinced, so far as the evidence before you goes, that the accused is guilty—in other words, you ought not to find an indictment unless, in your judgment, the evidence before you, unexplained and uncontradicted, would warrant a conviction by a petit jury.

In re Charge to Grand Jury, 30 F. Cas. 992, 994, 2 Sawy. 667 (C.C.D. Cal. 1872).

Other courts and jurists at the time generally followed the same practice. *See*, *e.g.*, *Chief Justice Shaw's Charge to the Grand Jury*, Am. Jurist & L. Mag., July & Oct. 1832, at 216, 219 (Chief Justice of Massachusetts' 1832 charge indicating that the "rule" requires evidence sufficient to justify a conviction at trial); A. Oakey Hall, Brief for Grand Jurors in the County of New York 12 (2d ed. 1864) (directions to grand jurors in New York County republished in 1868 providing for the same standard). Indeed, a review of grand jury charges from

12. *Ex Parte Bain*, 121 U.S. 1, 10 (1887).

every state and U.S. territory circa 1791 found "that among the American judges of the Founding generation who expressed a view, Justice Wilson's position—that a grand jury should return an indictment only upon an evidentiary showing *more demanding* than probable cause—dominated." Ortman, *Probable Cause Revisited*, 68 Stan. L. Rev. at 520 (emphasis added); *id.* at 530-31 (noting that the standards used various formulations but they all went "beyond, and often far beyond, the bare 'probable cause' criterion"); *see also*, Thomas Davies, *The Fictional Character of Law-and-Order Originalism*, 37 Wake Forest L. Rev. 239, 427-28 (2002) ("Grand jurors performed that function more rigorously than modern grand juries because they did not merely assess whether there was probable cause for a prosecution; rather, at common law, grand jurors were usually instructed not to indict unless they were persuaded, based on the prosecutor's evidence, of the 'truth' of the accusation.").

Consistent with this practice, Justice Story recognized the rule in his comprehensive treatise on the Constitution in 1833.[13] Regarding the grand jury, he said they were to return a true bill "[i]f the grand jury are satisfied of the truth of the accusation." 3 Joseph Story, Commentaries, *supra*, § 1778. His words are telling. First, the phrase "satisfied of the truth of the accusation" comes directly from William Blackstone, who (as discussed below) also said the grand jury needed to be "thoroughly persuaded." 5 St. George Tucker, Blackstone's Commentaries with Notes of Reference 302-03 (1803). Second, Noah

13. Justice Story's treatise has been described as "by far the most comprehensive treatise on the United States Constitution that had then appeared." *Wallace v. Jaffree*, 472 U.S. 38, 104 (1985) (Rehnquist, J., dissenting).

Webster's contemporary dictionary defined "satisfy" as "[t]o supply fully," "[t]o free from doubt'" and most importantly, "**[t]o convince. A jury must be satisfied of the guilt of a man, before they can justly condemn him.**" NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) ("Satisfy") (emphasis added); *see also* Samuel Johnson, A Dictionary of the English Language (3rd ed. 1768) ("Satisfy": "To free from doubt, perplexity, or suspense"; "To convince").

No less a founding father than Thomas Jefferson described Virginia's grand jury process in 1782 as certainly more than finding probable cause: "[an accused felon] is to be **tried** first by a grand jury of 24, of whom 13 must concur in opinion: if they **find him guilty**." THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 136 (Boston 1829) (emphasis added).

Additionally, Daniel Davis, then Massachusetts Solicitor General, prepared a Treatise on grand juries and included a similar description of the "settled principle" regarding the grand jury standard of proof:

> It was formerly held, that the grand jury ought to find a bill, if *probable* evidence were adduced to support it, because it is only an accusation; and the prisoner can defend himself on his trial. But this is an oppressive and dangerous position; and has since been denied and almost reprobated by the greatest sages of the law, who have deprecated the ignominy, dangers of perjury, the anxiety of delay, and the misery of a prisoner, that might be the consequence of an accusation of an offence, upon evidence

> that does not fully satisfy the grand jury of the guilt of the defendant. Accordingly, it has now become a settled principle, that the grand jury cannot, consistently with their oath, find a bill, except on such testimony as would justify them, as a traverse jury, to find the prisoner guilty. . . . The reason of that principle of the law of evidence, that if a jury of trials entertain a doubt of the guilt of the party accused, they ought to acquit him, is equally applicable to a grand jury.

DANIEL DAVIS, PRECEDENTS OF INDICTMENTS; TO WHICH IS PREFIXED A CONCISE TREATISE UPON THE OFFICE AND DUTY OF GRAND JURORS 24-25 (Boston 1831) (emphasis in original).

Even as recently as 1906, George J. Edwards, Jr., in THE GRAND JURY: CONSIDERED FROM AN HISTORICAL, POLITICAL AND LEGAL STANDPOINT, AND THE LAW AND PRACTICE RELATING THERETO 105 (1906) stated:

> It was formerly thought in England that the grand jury should present "in case there be probable evidence," but this rule is now altered. In the Federal courts the rule there prevailing is thus stated by Mr. Justice Field, "To justify the finding of an indictment the grand jury must believe that the accused is guilty. They should be convinced that the evidence before them, unexplained and uncontradicted, would warrant a conviction by a petit jury."

The most prominent legal scholars of the day also articulated a higher grand jury standard of proof. "Early Americans drew heavily on legal scholars like William Blackstone," *Obergefell v. Hodges*, 576 U.S. 644, 690 (2015) (Roberts, J. dissenting), and, accordingly, Blackstone has long been relied upon for determining "the history and role of the grand jury," *United States v. Calandra*, 414 U.S. 338, 342 n.3 (1974). Blackstone described the grand jury as one of a "strong and twofold barrier, of a presentment and a trial by jury, between the liberties of the people, and the prerogative of the crown." 4 Blackstone, Commentaries, *supra*, at 349. Towards that end, as mentioned above, Blackstone explained that the grand jury was to be "thoroughly persuaded of the truth of an indictment." *Id.* at 303. Blackstone's words were a rejection of probable cause. *See* Johnson, A Dictionary of the English Language, *supra* (Thoroughly: "Completely; fully"); *cf. Thomas Watie's Charge, Beaufort, Orangeburgh, & Ninety-Six Districts, [South Carolina,] 1789*, *in* 2 Gentlemen, at 1243 ("you ought to be thoroughly persuaded of the truth of an indictment, as far as the evidence goes, . . . and ought not to send a person to his trial upon probable grounds only").

Blackstone was not alone. As referenced, Joseph Chitty, John Somers, and Matthew Hale's later editions all indicated that the law of indictments had moved to a higher standard than probable cause. Additionally, Henry Care's "influential treatise,"[14] English Liberties, or the Free-Born Subject's Inheritance (4th ed. 1719), published in America in 1721 and 1774, belittled the concept of mere probable cause for the grand jury:

14. *Obergefell*, 576 U.S. at 724 n.2 (Thomas, J. dissenting).

> But if this were all, to what purpose have we Grand Juries at all? Why are the wise, best men in the county, for such they are or should be, troubled? Why are they so strictly sworn? Do not flatter yourselves, you of the Grand Jury are as much upon your oaths as the petty jury; and the life of the man, against whom the bill is brought, is in your hands.

Id. at 257.

Richard Burn may have written the most widely circulated Justice of the Peace manual in England, and numerous variations were published in America, including Benjamin Franklin's edition of Conductor Generalis. In the section "Guide to Juries," that edition expressly rejects the idea that a grand jury should indict as a matter of course based only on "Colour of Evidence," or "Probability of the Thing being true." Conductor Generalis: Or, the Office, Duty and Authority of Justices of the Peace 391 (Philadelphia, B. Franklin & D. Hall, 2d ed. 1750). It notes the Grand Juror's Oath is "True Presentment," not "probable." *Id.* It specifically attacks (and rejects) the idea that "vera" merely means "probable," rather than "true." *Id.* at 392. The text repeatedly says that doubt should result in *Ignoramus* [today's "No True Bill"] not *Billa vera* [today's "True Bill"], including statements that if the jurors are "doubtful, or not satisfied," the bill must be endorsed not *Billa vera* but *Ignoramus*, and that they must know "beyond all Doubt" before saying *Billa vera.* *Id.* at 394-95.[15]

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15. Similar language is found in the James Parker's edition published in 1788. *See also* John A. Conley, *Doing It by the Book:*

Additionally, Richard Burn (posthumous) and his son published a Law Dictionary in 1792. In it the term "Indictment" specifically includes the following:

> The grand jury are only to hear evidence on behalf of the prosecution; for the finding of an indictment, is only in the nature of an inquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to inquire upon their oaths, whether there be sufficient cause to call upon the party to answer it. However, they ought to be thoroughly persuaded of the truth of an indictment so far as their evidence goes; for the indictment being the foundation of all, and commonly found in the absence of the party accused, it is necessary there should be substantial proof.

2 Richard Burn & John Burn, A New Law Dictionary 14 (1792).

Importantly, the historical evidence is supported by the text of the Bill of Rights, which distinguishes between the standards governing the Fourth and Fifth Amendments. The Fourth Amendment expressly requires "probable cause" for searches and arrests, while the Fifth Amendment and its Grand Jury Clause—adopted simultaneously and being the next step of criminal charging—omits any such requirement. This omission

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Justice of the Peace Manuals and English Law in Eighteenth Century America, 6 J. Legal Hist. 257, 265, 267 (1985) (noting that these manuals were the justices' "primary source of legal reference" and of "practical value for a wider audience than the justices").

is best understood as intentional. For the Constitution to require only the same minimal threshold both to arrest someone and to formally accuse them and force them to trial is illogical and contrary to the grand jury's historical role. Reading "probable cause" into the Grand Jury Clause collapses this distinction and reduces the grand jury from an independent constitutional safeguard to a mere ratifier of executive suspicion.

According to Blackstone's COMMENTARIES, an accusation for arrest and detainment was historically viewed differently than the formal accusation of an indictment. Blackstone organized the various stages of a criminal proceeding under twelve general heads, following each other in a progressive order. 4 BLACKSTONE, COMMENTARIES, *supra*, at 289. He listed *prosecution*, as the third step in a list of successive stages after arrest and examination by a justice of the peace to determine whether a suspect should be discharged, committed to prison, or admitted to bail. He then spoke of "prosecution, or the *manner of their formal accusation*." *Id.* at 301 (emphasis added). By "formal accusation," Blackstone was referring to "indictment." The term "formal" distinguishes "prosecution" from earlier stages of the process involving a less formal kind of accusation. Blackstone viewed the accusation justifying arrest as preliminary to the "formal accusation." Given that Blackstone's "works constituted the preeminent authority on English law for the founding generation," *Alden v. Maine*, 527 U.S. 706, 715 (1999), there is no reason to conclude that formally accusing someone and forcing them to trial under the Fifth Amendment, which does not include the Fourth Amendment's "probable cause" standard, requires only the same minimal threshold needed to arrest.

Tellingly, the Eighth Circuit below did not reject the historical evidence of the understanding of the grand jury standard circa 1791, and the Government did not refute it. Rather, the Eighth Circuit held it was bound to accept probable cause as the established standard based on this Court's dicta. As discussed below, however, this Court has never been presented with a question regarding the proper grand jury standard, and it has never analyzed, much less resolved, the issue. In disregarding the original public understanding of the Fifth Amendment based on dicta and passing language, the Eighth Circuit ignored this Court's directives as to the proper understanding of constitutional guarantees and thus perpetuated a "flawed criminal procedure[]." *Ramos*, 590 U.S. at 114 (Sotomayor, J., concurring).

II. This Court Has Never Addressed the Proper Grand Jury Standard of Proof, and Its Review Is Needed to Correct the Use of an Unconstitutional Criminal Procedure.

A. This Court Has Never Been Asked to Determine the Grand Jury Standard of Proof Under the Fifth Amendment.

In holding that probable cause is the established standard, the Eighth Circuit relied on non-binding references to probable cause in this Court's much later cases because it concluded that "we must respect the language used by the Supreme Court . . . regardless of whether it is controlling." App. at 9a (citation omitted). That approach, however, is directly contrary to this Court's express instructions regarding dicta and effectively elevated that language above the established principles of constitutional interpretation discussed above.

As this Court has made clear, only its holdings are binding, and the language of the Court's decisions "must be read with a careful eye to context" because the "opinions dispose of discrete cases and controversies." *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 373-74 (2023). Thus, "the Court's dicta, even if repeated, does not constitute precedent" because it is not the result of a full consideration of the issue. *Castro-Huerta*, 597 U.S. at 645. "[T]o make it [a holding], there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties." *Carroll v. Carroll's Lessee*, 57 U.S. 275, 287 (1853). When "the point before [the Court] now was not then fully argued" and the Court "did not canvas the considerations" presented in a subsequent context, the dicta need not be followed. *Kirtsaeng*, 568 U.S. at 548.

The Eighth Circuit's decision below is contrary to these admonitions because none of the cases it cited involved any analysis regarding the grand jury standard of proof. For example, the court relied on the reference to probable cause in *Beavers v. Henkel*, 194 U.S. 73, 84-85 (1904). Yet, *Beavers* addressed the standard of proof for arresting and removing the defendant to a district different than where he resided. The record shows neither party's brief included any discussion, debate, or analysis of the proper grand jury standard of proof. App. at 271a-387a.

The Eighth Circuit's reliance on *Ex Parte Bain*, 121 U.S. 1 (1887) is equally misplaced. *Bain* mentioned "probable cause" only once, *id.* at 12, and the decision addressed whether courts could amend an indictment instead of the grand jury. *Bain* never analyzed the proper standard of proof for a grand jury.

The other cited cases also never address the proper grand jury standard of proof. *United States v. Calandra*, *supra*, "present[ed] the question whether a witness summoned to appear and testify before a grand jury may refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search and seizure." 414 U.S. at 339. That issue did not require an examination of the grand jury standard of proof, and neither the Government's nor the Respondent's brief make any reference to that standard. Rather, "probable cause" is mentioned only in reference to a search warrant. *United States v. Calandra*, 1973 WL 172664, at 4 (Brief for the United States); *United States v. Calandra*, 1973 WL 172665, at 3 (Brief for Respondent).

Similarly, *Branzburg v. Hayes*, 408 U.S. 665 (1972), addressed a wholly unrelated question. As this Court noted, "[t]he issue in these cases is whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment." *Id.* at 667. There was no debate regarding the grand jury standard of proof. Rather, "[t]he sole issue before us is the obligation of reporters to respond to grand jury subpoenas. . . ." *Id.* at 682.

In *Kaley v. United States*, 571 U.S. 320 (2014), this Court addressed whether criminal defendants can contest a grand jury's determination of probable cause at a hearing challenging the pretrial seizure of property. *Id.* at 322. This Court was not asked to determine whether the grand jury had been instructed on the proper standard of proof, and neither the Petitioners' nor the Government's brief referenced any question regarding that standard.

Kaley v. United States, 2013 WL 3377323 (Petitioners' Merits Brief); *Kaley v. United States*, 2013 WL 4737190 (Brief for the United States).

And, finally, the last case the Eighth Circuit cited below did not address any issue regarding the grand jury. *Shadwick v. City of Tampa*, 407 U.S. 345 (1972). Rather, *Shadwick* involved questions regarding the issuance of a warrant, and the grand jury is referenced only once.

B. The Unconstitutional Standard of Proof Will Not Be Remedied Without this Court's Review.

"The Constitution demands more than the continued use of flawed criminal procedures." *Ramos v. Louisiana*, 590 U.S. at 114 (Sotomayor, J., concurring). Here, the flawed procedure has rendered the Fifth Amendment's right to indictment by a grand jury largely superfluous and ineffective, but it is unlikely to be remedied without this Court's review. The Eighth Circuit below disregarded clear, unrefuted evidence of the understanding of the Fifth Amendment's grand jury right at the time of its adoption because it assumed that probable cause has been accepted as the constitutional standard. There is no reason to think other circuits will do anything differently. The incorrect standard is applied without question or acknowledgement day after day throughout the country. *See e.g.*, *United States v. Bergeson*, 425 F.3d 1221, 1226 (9th Cir. 2005) ("All a federal grand jury needs to indict is 'probable cause.'") (quoting *Branzburg*, *supra*); *In re Grand Jury Subpoenas, Apr., 1978, at Baltimore*, 581 F.2d 1103, 1108 (4th Cir. 1978) ("A grand jury is convened to determine 'if there is probable cause to believe that a crime has been committed.'") (quoting *Branzburg, supra*);

United States v. Briggs, 514 F.2d 794, 800 (5th Cir. 1975) ("In its investigative-accusative function the grand jury determines if there is probable cause to believe a crime has been committed.") (quoting *Branzburg, supra* and *Calandra, supra*); *United States v. Rivera*, 2025 WL 3564736, at 4 (11th Cir. Dec. 12, 2025) ("grand jury's core competence and traditional function—to determine whether there is probable cause to think the defendant committed a crime.") (quoting *Kaley, supra*). The misguidance in these courts' reliance on dicta is clearly demonstrated by the multiple citations to *Branzburg* as asserting the grand jury standard of proof was probable cause when *Branzburg* made clear, "[t]he sole issue before us is the obligation of reporters to respond to grand jury subpoenas. . . ." 408 U.S. at 682.

As Justice Scalia has noted, this Court "disagreeing with a 'clear majority' of the Circuits is not at all a rare phenomenon. Indeed, our opinions sometimes contradict the *unanimous* and longstanding interpretation of lower federal courts." *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Hum. Res.*, 532 U.S. 598, 621-22 (2001) (Scalia, J. concurring) (noting that the Circuits have sometimes "been nurtured and preserved *by our own misleading dicta* . . . [which] have misled them.").

The district court's decision in this case is telling. Despite rejecting Petitioners' challenge, the court noted that "[Petitioners] rely on creditable sources and a reputable interpretive methodology, and the Government has not identified any case that squarely rejects their historical claims or their legal argument," App. at 22a. In short, the court acknowledged the strength and merit of Petitioners' arguments and still refused to hold the

probable-cause standard unconstitutional because of its erroneous conclusion that the issue was settled even while recognizing it has never been squarely addressed.

The lower courts' undue reliance on dicta and rote acceptance of probable cause is particularly harmful here given the constitutional question presented and fundamental right at stake. This Court has recognized that the weight due to prior holdings under *stare decisis* is "at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." *Agostini v. Felton*, 521 U.S. 203, 235 (1997). That recognition applies with even greater force here where courts have relied upon dicta to interpret the Constitution.

In sum, this Court's review is essential to settle this as yet unaddressed critical question of constitutional law. The historical evidence demonstrates that circa 1791 the original meaning of "indictment of a Grand Jury" was understood to carry a higher-level standard of proof than mere probable cause. The role of the grand jury as the protective bulwark is significantly waning (in reality and even more so reputationally), and the weakening of that right will continue unchecked without this Court's correction of existing dicta.

III. This Case is an Excellent Vehicle to Address the Grand Jury Standard of Proof.

This case is an excellent vehicle to address the unconstitutionality of the current grand jury standard of proof. The relevant facts are not disputed. The Government does not disagree that the grand jurors were

given a probable-cause instruction, and Petitioners raised, and the courts below addressed the legal question as to the constitutionality of the instruction.

Moreover, this is the only issue to resolve, and it is outcome dispositive. If an improper standard was provided to the grand jury, then the indictment is a nullity. Dismissal of the indictment is appropriate either pre- or post-trial "'if it is established that the violation substantially influenced the grand jury's decision to indict,'" or if there is "'grave doubt'" that the decision to indict was "free from the substantial influence of such violations." *Bank of Nova Scotia*, 487 U.S. at 256-57 ("presumption of prejudice" allowed when "the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair"). Such doubt necessarily results when the grand jury is instructed on an improper standard of proof. In the context of a petit jury, this Court held that "where the instructional error consists of a misdescription of the burden of proof, [it] vitiates *all* the jury's findings." *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993) (emphasis in original). The same analysis must apply here.

Finally, correcting the "flawed criminal procedure" will have a significant impact on the rights of defendants and will mandate changes in grand jury practice, but it will not result in dramatic disruption of criminal justice. First, it will not pose any risk to prior convictions because it will not have retroactive application. *See Edwards v. Vannoy*, 593 U.S. 255, 272 (2021) (holding "[n]ew procedural rules do not apply retroactively on federal collateral review"). Second, it will not impose

an unreasonable burden on prosecutors. "If it is clear that a practice is unlawful, individuals' interest in its discontinuance clearly outweighs any law enforcement 'entitlement' to its persistence." *Arizona v. Gant*, 556 U.S. 332, 349 (2009). Any grand-jury proceeding would still very much favor the prosecutor. Targets are given no right to present their version of the facts: they do not have a right to appear before the grand jury, and they are not permitted to have counsel present. The prosecutor has no legal obligation to offer exculpatory evidence and is permitted to introduce evidence which might not be admissible at trial. Moreover, only a majority of the grand jurors need to agree on an indictment. Even if grand jurors decline to prosecute a matter, prosecutors can resubmit it to the same or a different grand jury. These procedural parameters are exactly why a higher standard of proof is, and was, necessary.

As Coke averred, "seeing the indictment is the foundation of all, it is most necessary to have substantial proof." Edward Coke, The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes 25-26 (London 4th ed. 1669). Under the Constitution, no one should face criminal prosecution and trial without the full protection of the Fifth Amendment. That protection only exists as it did circa 1791 with a higher standard of proof. This Court's review and correction is needed to restore the most integral related Fifth Amendment right.

CONCLUSION

The petition for a writ of certiorari should be granted, and the matter remanded with directions to vacate the judgment and dismiss the indictment.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FILED FEBRUARY 11, 2026

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 25-1396

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHRISTOPHER L. CARROLL, ALSO KNOWN AS CHRIS; WHISKEY DIX BIG TRUCK REPAIR, LLC,

Defendants-Appellants.

Appeal from United States District Court
for the Eastern District of Missouri – St. Louis

Submitted: November 20, 2025
Filed: February 11, 2026

Before COLLOTON, Chief Judge, SHEPHERD and ERICKSON, Circuit Judges.

SHEPHERD, Circuit Judge.

After a jury trial, Christopher Carroll was convicted of six fraud counts stemming from his application for and

receipt of funds pursuant to the Paycheck Protection Program (PPP) during the Covid-19 pandemic. Carroll was also convicted of sixteen counts of tampering with a Clean Air Act (CAA) monitoring device, one count of conspiracy to violate the CAA, and two counts of witness tampering, while his co-defendant, Whiskey Dix Big Truck Repair, LLC, (WDBTR) was convicted of sixteen counts of tampering with a CAA monitoring device. The district court[1] sentenced Carroll to 108 months' imprisonment and ordered him to pay over $3 million in restitution and sentenced WDBTR to 3 years' probation and ordered it to pay an assessment of $6,400. On appeal, both Carroll and WDBTR challenge the district court's denial of their motion to dismiss the indictment on the grounds that the grand jury was improperly instructed that the probable cause standard governed its charging decision. Carroll also challenges the district court's decision at trial to allow the Government to introduce evidence that Carroll was on parole for a previous criminal conviction at the time he committed the instant offenses. Having jurisdiction under 28 U.S.C. § 1291, we affirm.

I.

In 2021, Carroll, along with a business associate, George Reed, were indicted on bank fraud and money laundering charges stemming from their scheme to receive PPP funds by making material misrepresentations

1. The Honorable Sarah E. Pitlyk, United States District Judge for the Eastern District of Missouri, adopting the report and recommendation of the Honorable Stephen R. Welby, United States Magistrate Judge for the Eastern District of Missouri.

that their business, Square One Group (SOG), intended to use PPP funds to cover payroll and other business expenses, when Carroll and Reed actually used the funds for personal use and to acquire assets to start WDBTR. After Reed pled guilty to one count of bank fraud, a grand jury returned a superseding indictment, which charged Carroll with three counts of bank fraud, six counts of money laundering, three counts of making false statements to a financial institution, one count of conspiracy to violate the CAA, twenty-one counts of tampering with a CAA monitoring device, and two counts of witness tampering. The financial crimes stemmed from the alleged misrepresentations regarding the PPP fraud scheme, while the CAA charges arose from Carroll's involvement in disabling the emissions controls on WDBTR trucks to enhance their performance and in concealing this tampering with the emissions control devices. Finally, the witness tampering charges arose from Carroll's attempts to influence two individuals to provide false information or otherwise impede law enforcement in their investigation of the CAA offenses. The superseding indictment also added WDBTR as a defendant, charging it, alongside Carroll, with twenty-one counts of tampering with CAA monitoring devices.

Carroll and WDBTR then filed a motion to dismiss the indictment, asserting that the district court lacked jurisdiction because the grand jury misapplied the Fifth Amendment burden of proof applicable to indictments. Carroll and WDBTR asserted that historical evidence demonstrated that the probable cause standard was not always the accepted standard and that the Founders

envisioned a standard of proof higher than probable cause. A magistrate judge issued a report and recommendation, recommending that the district court deny the motion. The magistrate judge noted that the Supreme Court has long recognized the standard for grand juries as probable cause and stated that Carroll and WDBTR "have failed to convince the undersigned that the grand jury standard, long recognized by the Supreme Court, is in conflict with the grand jury standard as they allege it existed in 1791." Over Carroll and WDBTR's objections, the district court adopted the report and recommendation. In doing so, the district court noted that "[t]he Supreme Court has acknowledged and applied the probable cause standard many times," and stated that it "decline[d] Defendants' invitation to reject a standard that the United States Supreme Court has accepted." Carroll and WDBTR immediately appealed, asserting that the district court's order was appealable under the collateral order doctrine, but this Court dismissed the appeal for lack of jurisdiction as premature.

Before trial, Carroll filed a motion in limine seeking to exclude any evidence related to his status as a parolee for a prior criminal conviction. As alleged in the superseding indictment, the PPP loan application contained the answer "no" to the question of whether any individual owning 20% or more of the company seeking a PPP loan was currently on parole, when at the time of the application, Carroll was an owner of SOG and was on parole following a term of imprisonment for a previous felony conviction. The superseding indictment alleged that this was one of the material misrepresentations in the PPP application,

and that in an effort to avoid disclosing his parole status, Carroll omitted his name entirely from the PPP application, instead submitting it in his wife's name. In his motion in limine, Carroll asserted that he did not qualify as an owner of SOG under the definition contained in the PPP application and was therefore not required to include his name on the PPP application, let alone disclose that he was currently on parole. According to Carroll, because he did not make any misrepresentation about his parole status in the PPP application, any reference to it was entirely irrelevant to the charges against him, was highly prejudicial, and should be excluded from any evidence at trial. The Government filed its own motion in limine, seeking admission of Carroll's felony conviction and parole status. The Government asserted that Carroll's parole status was integral to the scheme to defraud because the superseding indictment specifically alleged that Carroll completed the PPP application in a manner to conceal his parole status. The Government argued that, while Carroll disputed whether he qualified as an owner of SOG as defined in the PPP application, Carroll's failure to disclose his parole status was relevant to his intent to defraud, regardless of the factual accuracy of whether he was an owner of SOG.

The district court determined that evidence related to Carroll's parole status was admissible, concluding that whether Carroll intentionally left his name off the PPP application to avoid disclosing his parole status or because he did not believe, under the definition of owner in the application, that he qualified as an owner of SOG was a question for the jury to resolve. The district

court explained that both parties would be permitted to introduce evidence about Carroll's intent when filling out the PPP application. Ultimately, because Carroll's intent was at issue, the district court concluded that Carroll's parole status was highly probative of why he might not have included his name on the PPP application and allowed the evidence to be introduced at trial.

After a five-day trial, the jury found Carroll guilty of three counts of bank fraud, three counts of making false statements to a financial institution, one count of conspiracy to violate the CAA, sixteen counts of tampering with a CAA monitoring device, and two counts of witness tampering.[2] Carroll then filed a motion for a mistrial or a new trial, again challenging the district court's decision to allow evidence of his prior conviction and parole status to be introduced at trial. The district court denied the motion for the same reasons as in its earlier ruling. The district court also noted that, even if it had erred in admitting the evidence of Carroll's prior conviction, a new trial was warranted only where the evidence was so prejudicial that a new trial would likely render a different result, and, given the strength of the Government's evidence, a new trial would not likely produce a different result. The district court subsequently sentenced Carroll to 108 months' imprisonment and ordered over $3 million in restitution and sentenced WDBTR to 3 years' probation and ordered it to pay an assessment of $6,400. This appeal follows, with Carroll and WDBTR challenging

2. Prior to trial, on motion of the Government, the district court dismissed the money laundering counts and five counts of tampering with a CAA device.

the denial of the motion to dismiss the indictment and Carroll challenging the admission of evidence of his prior conviction.

II.

First, Carroll and WDBTR assert that the district court erred in denying their motion to dismiss the indictment because an indictment returned by the grand jury under a probable cause standard of proof is invalid. According to Carroll and WDBTR, under a founding-era analysis of the Fifth Amendment's grand jury clause, an indictment requires a standard of proof "more stringent" than probable cause. Further, Carroll and WDBTR assert that "no Supreme Court decision has ever actually addressed the issue and held that the standard for indictments should be 'probable cause.'" "We review the denial of a motion to dismiss an indictment *de novo*." *United States v. Wilson*, 939 F.3d 929, 931 (8th Cir. 2019).

We are unpersuaded by Carroll and WDBTR's contentions. Under the Fifth Amendment, "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury." U.S. Const. amend. V. While the Constitution mandates the initiation of federal prosecution through a grand jury, it does not provide the standard under which a grand jury should return an indictment. *See Albright v. Oliver*, 510 U.S. 266, 282, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994) (Kennedy, J., concurring) ("The specific provisions of the Bill of Rights [in the Fifth and Sixth Amendments] neither impose a standard for the initiation

of a prosecution, nor require a pretrial hearing to weigh evidence according to a given standard."). However, for over 130 years, the Supreme Court has recognized that probable cause is the standard governing grand jury proceedings. *See Ex parte Bain*, 121 U.S. 1, 12, 7 S. Ct. 781, 30 L. Ed. 849 (1887) ("[T]he grand jury is as valuable as ever in securing . . . 'individual citizens from an open and public accusation of crime, and from the trouble, expense, and anxiety of a public trial before a *probable cause* is established by the presentment and indictment of such a jury; and in case of high offenses it is justly regarded as one of the securities to the innocent against hasty, malicious, and oppressive public prosecutions.'" (emphasis added) (citation omitted)), *overruled on other grounds by United States v. Cotton*, 535 U.S. 625, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002); *see also Beavers v. Henkel*, 194 U.S. 73, 84, 24 S. Ct. 605, 48 L. Ed. 882 (1904) ("The grand jury is a body known to the common law, to which is committed the duty of inquiring whether there be probable cause to believe the defendant guilty of the offense charged."). And the Supreme Court has often reiterated this standard. *See*, *e.g.*, *Kaley v. United States*, 571 U.S. 320, 328, 134 S. Ct. 1090, 188 L. Ed. 2d 46 (2014) ("This Court has often recognized the grand jury's singular role in finding the probable cause necessary to initiate a prosecution for a serious crime."); *United States v. Calandra*, 414 U.S. 338, 343, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974) ("The grand jury's historic functions survive to this day. Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions.");

Branzburg v. Hayes, 408 U.S. 665, 686-87, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972) ("[T]he ancient role of the grand jury . . . has the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions."); *Shadwick v. City of Tampa*, 407 U.S. 345, 352, 92 S. Ct. 2119, 32 L. Ed. 2d 783 (1972) ("Grand juries daily determine probable cause prior to rendering indictments, and trial juries assess whether guilt is proved beyond a reasonable doubt."). This authority convincingly demonstrates that the probable cause standard has long been accepted by the Supreme Court as the proper standard for the grand jury.

Insofar as Carroll and WDBTR assert that the Supreme Court has never addressed the question precisely as they raise it here, the claim does not change our analysis. Even if the Supreme Court has not made an express holding about the probable cause standard, "[a]ppellate courts should afford deference and respect to Supreme Court dicta, particularly where . . . it is consistent with longstanding Supreme Court precedent." *In re Pre-Filled Propane Tank Antitrust Litig.*, 860 F.3d 1059, 1064 (8th Cir. 2017). The Supreme Court has time and again recited the probable cause standard in its decisions discussing grand jury indictments, and "we must respect the language used by the Supreme Court . . . regardless of whether it is controlling." *United States v. Adams*, 914 F.3d 602, 611 (8th Cir. 2019) (Kelly, J., concurring). And, indeed, following Supreme Court precedent, our Court has recited the probable cause standard. *See*, *e.g.*, *United States v. Harper*, 466 F.3d 634,

644-45 (8th Cir. 2006) ("As a threshold matter, we note that the district court's statements regarding probable cause were correct statements of the law. The grand jury returns an indictment only upon a finding that there is probable cause to believe that a crime has been committed and criminal proceedings should be instituted against a particular defendant." (citing *Calandra*, 414 U.S. at 343-44)). We decline Carroll and WDBTR's invitation to reject the long-standing probable cause standard for grand jury indictments. Accordingly, the district court did not err in denying Carroll and WDBTR's motion to dismiss the indictment.

III.

Next, Carroll asserts that the district court erred when it allowed the Government to introduce evidence about Carroll's parole status. Carroll asserts that, because the PPP loan application required only owners of the company to disclose their parole status, and under the application's definition of owner he did not qualify, his parole status was not required to be disclosed, was irrelevant to the charges, and was highly prejudicial. "We review [the] district court's . . . evidentiary rulings and denial of a motion for a new trial for abuse of discretion." *United States v. Oliver*, 987 F.3d 794, 799 (8th Cir. 2021) (first alteration in original) (citation omitted). However, "we will not reverse a conviction if errors were harmless," which occurs "when, after reviewing the entire record, we determine that the substantial rights of the defendant were unaffected, and that the error did not influence or had only a slight influence on the verdict." *Id.* (citation omitted).

First, Carroll appears to focus his argument largely on the question of whether he, as matter of law, qualified as an owner of SOG under the definition used in the PPP application, even suggesting that a de novo standard of review applies to this question of law. However, the issue Carroll raises is one challenging an evidentiary ruling regarding Carroll's criminal history, which is separate and apart from the question of legal ownership of SOG. Properly framed, the issue is whether the district court erred in its determination that the evidence of Carroll's parole status was relevant and that the unfair prejudice of this evidence did not outweigh its probative value.

Relevant evidence has any tendency to make a fact of consequence "more or less probable than it would be without the evidence." Fed. R. Evid. 401(a). However, a court may exclude relevant evidence where "its probative value is substantially outweighed by a danger of . . . unfair prejudice." Fed. R. Evid. 403. "'Unfair prejudice "speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.'" Unfair prejudice does not occur, however, merely because a piece of evidence damages a defendant's case." *United States v. Nadeau*, 598 F.3d 966, 969 (8th Cir. 2010) (citation omitted). As the district court found, evidence of Carroll's parole status was highly relevant to the question of his intent in filling out the PPP application and thus his overall intent to defraud. And the danger of unfair prejudice did not substantially outweigh the probative value of this evidence, especially where the district court instructed the jury that, if it believed Carroll acted in good faith, he could

not be guilty of the crimes of bank fraud and making false statements to a financial institution. Further, the district court limited the evidence of Carroll's prior conviction and parole status "to just the fact that Mr. Carroll committed a felony and some of the details of his parole and no other details about that conviction in [the] case–in–chief," and allowed Carroll to present evidence to support his claim that he believed he did not qualify as an owner of SOG under the definition used in the PPP application. Given the foregoing, we find no error in the district court's balancing of the probative value of the prior conviction with the risk of unfair prejudice. *Cf. United States v. Williams*, 796 F.3d 951, 960 (8th Cir. 2015) ("In light of the district court's careful analysis and appropriate limiting instruction, we cannot conclude that the court abused its discretion by admitting the evidence of [defendant]'s previous . . . convictions.").

Further, even assuming the district court erred, we hold that any error would be harmless. Over the five-day trial, the jury heard testimony from 18 witnesses and viewed numerous exhibits that detailed Carroll's actions and participation in the overall scheme to defraud. This included evidence that Carroll and Reed used their wives' names in the PPP applications despite neither wife holding a management position with SOG, that Carroll used PPP funds to purchase trucks to start up WDBTR while furloughing SOG employees and cancelling their health insurance, and that Carroll deposited PPP funds directly into his own personal account. Carroll has provided nothing to suggest that the fact of his prior conviction and parole status alone was so crucial to the

jury's deliberations that it had more than a slight influence on the verdict. *See United States v. Red Legs*, 28 F.4th 931, 936 (8th Cir. 2022) (holding that "because substantial evidence other than [the challenged] testimony supported the jury's verdict, any error in admitting [the] testimony was harmless and does not warrant reversal"). Coupled with the district court's efforts to ameliorate the risk of unfair prejudice from the introduction of Carroll's prior conviction by allowing Carroll to offer his defense and instructing the jury on good faith, we are convinced that, if any error occurred, it would have been harmless. *See United States v. Hawkins*, 796 F.3d 843, 865 (8th Cir. 2015) (holding that the erroneous admission of an exhibit was harmless "in light of the strength of the government's case against [defendant] and the safeguards implemented to minimize the prejudicial effect of the exhibit."). The district court thus did not abuse its discretion in denying Carroll's motion for a new trial based upon the admission of evidence of his prior conviction and parole status.

IV.

For the foregoing reasons, we affirm the judgment of the district court. We also deny Carroll and WDBTR's motion to supplement the record.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION, FILED APRIL 10, 2024

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 4:21-cr-00532-SEP

UNITED STATES OF AMERICA,

Plaintiff,

v.

CHRISTOPHER LEE CARROLL, *et al.*,

Defendants.

MEMORANDUM AND ORDER

Before the Court are Defendants' Motion for Severance of Counts, Doc. [180]; Defendants' Motion for Disclosure of Certain Testimony and Legal Instructions Provided to the Grand Jury, Doc. [188]; Defendants' Motion to Dismiss Money Laundering Counts for Failure to State a Claim, Doc. [189]; Defendants' Motion to Strike Portions of the Indictment, Doc. [190]; Defendant Carroll's Motion to Suppress Proffer Statements, Doc. [192]; Defendants' Motion to Dismiss Because of Misrepresentations Presented to the Grand Jury, Doc.

[197]; Motion of the United States to Dismiss Counts 4-9, Doc. [203]; Defendants' Motion to Dismiss Indictment Based on the Court's Lack of Jurisdiction, Doc. [220]; and Defendants' Motion for Removal of April 1, 2024, Trial Setting, Doc. [253].

The pretrial motions were fully briefed before United States Magistrate Judge Stephen R. Welby,[1] who conducted two hearings and issued a Report and Recommendation (R&R), recommending that this Court deny Defendants' multiple motions and grant the United States' Motion to Dismiss Counts 4-9. *See* Doc. [240]. Defendants filed two documents objecting to Judge Welby's R&R. *See* Docs. [245], [246]. Their objections being fully briefed, *see* Docs. [247]-[250], the motions are ripe for this Court's review. 28 U.S.C. § 636(b)(1). While those objections were pending before this Court, Defendants filed their Motion for Removal of the April 1, 2024, Trial Setting, which is also fully briefed. *See* Docs. [253]-[255]. For the reasons set forth below, the Court adopts Judge Welby's R&R, denies Defendants' motions, grants the Government's request to dismiss Counts 4 through 9 of the Superseding Indictment, and grants Defendants' Motion for Removal of the April 1, 2024, Trial Setting.

1. The Court referred this matter to United States Magistrate Judge Stephen R. Welby for a report and recommendation on all dispositive matters pursuant to 28 U.S.C. § 636(b).

Appendix B

DISCUSSION

I. Defendants' Objections to the Report and Recommendation

The procedural history of this case is well summarized in Judge Welby's R&R, *see* Doc. [240] at 2-3, and will not be rehearsed here. The Court reviews *de novo* those portions of the most recent R&R to which Defendants have objected.[2] *Thompson v. Nix*, 897 F.2d 356, 357-58 (8th Cir. 1990) (per curiam); 28 U.S.C. § 636(b)(1). The Court may then "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). The Court has conducted a *de novo* review of all matters related to Defendants' objections, including a thorough review of the parties' briefing of the objections as well as their briefing of the motions to which those objections relate, the R&R itself, and Defendants' motion for reconsideration thereof. *See* Docs. [188], [190], [197], [202], [211], [212], [220], [223], [224], [232], [236], [243], [245]-[250]. The Court has also reviewed the transcripts of the two hearings held by Judge Welby. *See* Docs. [226], [234].

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2. Neither party objects to the R&R's analysis of Defendants' Motion for Severance of Counts, Doc. [180]; Defendants' Motion to Dismiss Money Laundering Counts for Failure to State a Claim, Doc. [189]; Defendant Carroll's Motion to Suppress Proffer Statements, Doc. [192]; or the Motion of the United States to Dismiss Counts 4-9, Doc. [203]; The Court adopts the Magistrate Judge's recommendations as to those motions. *See* 28 U.S.C. § 636(b).

Appendix B

Defendants object to two aspects of the R&R. Both of Defendants' objections to the R&R largely restate the arguments they made to the Magistrate Judge. *Compare* Doc. [246] at 2-3, *with* Doc. [197] at 4-5; *compare* Doc. [245], *with* Doc. [220]. Defendants' first objection focuses on a single phrase in the R&R, which they mischaracterize in a manner reminiscent of the objections to Judge Welby's last R&R in this case. *See* Doc. [156] at 2 (noting that Defendant Carroll had mischaracterized two of Judge Welby's past orders). Specifically, Defendants argue that Judge Welby was wrong to observe that "the Government vehemently disputes" the evidence Defendant Carroll has put forth "in support of his defense that he was not an owner of Square One." Doc. [240] at 9. According to Defendants, because the Government has not contested the validity of certain evidence that Defendant Carroll presented in support of his argument, the Court should reject Judge Welby's recommendation to deny their Motion to Dismiss Because of Misrepresentations Presented to the Grand Jury, Doc. [197], Motion to Strike Portions of the Indictment, Doc. [190], and Motion for Grand Jury Materials, Doc. [188], and instead grant those motions.

As the Government rightly observes, the R&R's recommendation that this Court deny those motions does not depend on the Government having disputed the validity of certain documentation. *See* Doc. [247] at 3. It depends, rather, on the Government having disputed whether that documentation (or any other evidence) sufficiently supports Defendant Carroll's defense. The Government intends to present evidence at trial that Defendant Carroll misrepresented his ownership interest

in Square One. Defendants argued to the Magistrate Judge that the evidence supports their position on that disputed question. The Magistrate Judge properly declined to decide that factual dispute in the context of ruling on a motion to dismiss, and this Court likewise declines to do so. *See* Doc. [240] at 8-10 ("All of Defendants' arguments that prosecutors made misrepresentations to the grand jury and provided the grand jury with false information require the Court to consider the evidence to decide whether a misrepresentation was made, or false information provided. The Court cannot make factual findings to decide a motion to dismiss.") (citing *United States v. Covington*, 395 U.S. 57, 60 (1969)). Accordingly, Defendants' objection to Judge Welby's recommendation that this Court deny Defendants' Motion to Dismiss Because of Misrepresentations Presented to the Grand Jury, Doc. [197], Motion to Strike Portions of the Indictment, Doc. [190], and Motion for Grand Jury Materials, Doc. [188], is overruled. Those motions are granted.

Second, Defendants object to Judge Welby's rejection of Defendants' argument that the indictment must be dismissed because the "probable cause" standard employed by the grand jury was improper. *See* Doc. [240] at 17-18. Defendants' objection is substantially the same as their argument to the Magistrate Judge, and the Court overrules it for the reasons laid out by Judge Welby and by the Government in its response to Defendants' objection. *See* Doc. [248]. The Supreme Court has acknowledged and applied the probable cause standard many times. Even if Defendants are correct that the Supreme Court

has never squarely ruled on what standard a grand jury should apply, the Supreme Court has considered what the Fifth Amendment requires of a grand jury, and its answer was a determination of probable cause:

> While many states, in the exercise of their undoubted sovereignty, have provided for trials of criminal offences upon information filed by the prosecuting officer, and without any previous inquiry or action by a grand jury, the national Constitution, in its solicitude for the protection of the individual, requires an indictment as a prerequisite to a trial. The grand jury is a body known to the common law, to which is committed the duty of inquiring whether there be *probable cause* to believe the defendant guilty of the offense charged.

Beavers v. Henkel, 194 U.S. 73, 84 (1904) (emphasis added) (citation omitted) (citing *Hurtado v. California*, 110 U.S. 516 (1884)). Defendants nevertheless urge this Court to find that the standard endorsed by the Supreme Court is invalid because it conflicts with the grand jury standard found in Blackstone. But the Supreme Court has treated those two standards as compatible:

> Blackstone says: . . . ["]A grand jury, however, ought to be thoroughly persuaded of the truth of an indictment, so far as their evidence goes; and not to rest satisfied merely with remote probabilities: a doctrine that might be applied

> to very oppressive purposes." The thought is that no one shall be subjected to the burden and expense of a trial until there has been a prior inquiry and adjudication by a responsible tribunal *that there is probable cause* to believe him guilty.

Id. (emphasis added) (citation omitted) (citing 4 William Blackstone, *Commentaries* *303).

The Court declines Defendants' invitation to reject a standard that the United States Supreme Court has accepted by finding inconsistent what the Supreme Court has deemed consistent. *See Kohlbeck v. Wyndham Vacation Resorts, Inc.*, 7 F.4th 729, 734 (8th Cir. 2021); *see also Bahlul v. United States*, 840 F.3d 757, 763 (D.C. Cir. 2016) (Kavanaugh, J., concurring) ("[W]e as a lower court generally treat Supreme Court dicta as authoritative.") (citing *United States v. Dorcely*, 454 F.3d 366, 375 (D.C. Cir. 2006) ("[C]arefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.")). Defendants' second objection to the R&R is overruled, and their Motion to Dismiss Indictment Based on the Court's Lack of Jurisdiction, Doc. [220], is denied.

II. Defendants' Motion for Removal of April 1, 2024, Trial Setting[3]

After the Magistrate Judge entered the R&R denying Defendants' Motion to Dismiss Indictment Based on the Court's Lack of Jurisdiction in response to this Court setting a trial date Defendants filed their Motion for Removal of April 1, 2024, Trial Setting, Doc. [253]. That motion effectively asks the Court to continue the trial indefinitely while they pursue an appeal of the Court's decision on Defendants' Motion to Dismiss Indictment Based on the Court's Lack of Jurisdiction. The United States argues in response that an appeal would be frivolous, so under *United States v. Grabinski*, "the filing of a notice of appeal will not divest the district court of jurisdiction." 674 F.2d 677, 679 (8th Cir. 1982). They therefore urge the Court to deny the motion and forge ahead with the trial. *See* Doc. [254].

Although the Court doubts that Defendants' substantive challenge to the probable cause standard will prevail, given the Supreme Court's long reliance on that standard, it cannot find that the argument is frivolous.[4]

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3. The Court alerted the parties that trial would not proceed on April 1st well ahead of that date. This Order provides the rationale for that decision.

4. The United States also argues that the Court's Order is not appealable under the collateral order doctrine. *See* Doc. [254] at 5-7. Whether an appeal falls within the collateral order doctrine goes to federal appellate court jurisdiction. *See Howard v. Norris*, 616 F.3d 799, 802 (8th Cir. 2010). *Grabinksi* instructs district courts to "make a written finding of whether *the motion* is frivolous

Defendants rely on creditable sources and a reputable interpretive methodology, and the Government has not identified any case that squarely rejects their historical claims or their legal argument. Because the argument is not frivolous, the Court grants Defendants' Motion for Removal of the April 1, 2024, Trial Setting, taking Defendants at their word that an immediate interlocutory appeal will follow the docketing of this Order.[5]

One last point. Under the Speedy Trial Act, the Court may exclude any period of delay "resulting from a continuance granted by any judge on his own motion or at the request of the defendant" if the "ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(7)(A). Here, the ends of justice served by granting Defendants the continuance they seek do outweigh the interests of Defendants and the public in a speedy trial. First, Defendants have requested the continuance so they can pursue an appeal of the Court's Order, so any prejudice to their interest in a speedy trial is outweighed by their interest in pursuing dismissal

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or nonfrivolous." 674 F.2d at 679 (emphasis added). The Court therefore finds that Defendants' Motion to Dismiss Indictment Based on the Court's Lack of Jurisdiction is not frivolous; it takes no position as to whether the Eighth Circuit has jurisdiction over any appeal under the collateral order doctrine.

5. Although this Order sets a new trial date, as well as a hearing date for the pending motions in limine, those dates will be stayed indefinitely if the Defendants do, in fact, pursue an interlocutory appeal of the Court's denial of their Motion to Dismiss Indictment Based on the Court's Lack of Jurisdiction.

of the case prior to trial. Second, given Defendants' declared intent to pursue an immediate appeal of the Court's Order, failure to grant the continuance "would be likely to make a continuation of such proceeding impossible." *Id*. § 3161(h)(7)(B)(i). The Court therefore finds that the delay caused by continuance from April 1 to May 13, 2024, is excluded from the computation of time for a trial setting under the Speedy Trial Act. *See* 18 U.S.C. § 3161(h)(7)(A). If Defendants make good on their promise to appeal, any additional delay will be excluded under 18 U.S.C. § 3161(h)(1)(C) (excluding "delay resulting from any interlocutory appeal").

Accordingly,

IT IS HEREBY ORDERED that Magistrate Judge Stephen R. Welby's Report and Recommendation, Doc. [240], is **SUSTAINED**, **ADOPTED**, and **INCORPORATED** herein.

IT IS FURTHER ORDERED that Defendants' Motion for Severance of Counts, Doc. [180], is **DENIED**.

IT IS FURTHER ORDERED that Defendants' Motion for Disclosure of Certain Testimony and Legal Instructions Provided to the Grand Jury, Doc. [188], is **DENIED**.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss Money Laundering Counts for Failure to State a Claim, Doc. [189], is **DENIED as moot**, but the

Government's Motion to Dismiss Counts 4-9, Doc. [203], is **GRANTED**.

IT IS FURTHER ORDERED that Defendants' Motion to Strike Portions of the Indictment, Doc. [190], is **DENIED**.

IT IS FURTHER ORDERED that Defendant Christopher Carroll's Motion to Suppress Proffer Statements, Doc. [192], is **DENIED without prejudice**. Defendant may raise the issue again as a motion in limine prior to trial.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss Because of Misrepresentations to the Grand Jury, Doc. [197], is **DENIED**.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss Indictment Based on the Court's Lack of Jurisdiction, Doc. [220], is **DENIED**.

IT IS FURTHER ORDERED that Defendants' Motion for Removal of April 1, 2024, Trial Setting, Doc. [253], is **GRANTED**.

IT IS FURTHER ORDERED that Defendants' motions in limine, Docs. [136], [193], will be heard on

April 17, 2024, at 1:00 p.m., in the Courtroom of the undersigned.[6]

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6. The time between filing of Defendants' motions in limine the first of which, Doc. [136], was filed on November 22, 2022 and the hearing on those motions on April 17, 2024, is excluded from calculation under the Speedy Trial Act by operation of 18 U.S.C. § 3161(h)(1)(D). That provision provides that periods of "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion" are excluded when computing the speedy-trial timeline. 18 U.S.C. § 3161(h)(1)(D). "[P]retrial motions excludable under the Act 'include any pretrial motion and are not limited to those enumerated in Federal Rule of Criminal Procedure 12(b)(2).'" *United States v. Davis*, 695 F. App'x 180, 183 (8th Cir. 2017) (quoting *United States v. Hohn*, 8 F.3d 1301, 1304-05 (8th Cir. 1993)). And the Supreme Court has held that "that Congress intended subsection (F) [now (D)] to exclude from the Speedy Trial Act's 70-day limitation all time between the filing of a motion and the conclusion of the hearing on that motion, whether or not a delay in holding that hearing is 'reasonably necessary.'" *Henderson v. United States*, 476 U.S. 321, 329-30 (1986); *see also United States v. Bloate*, 655 F.3d 750, 753 (8th Cir. 2011) ("[W]hether a pretrial motion actually caused or is expected to cause delay of trial is irrelevant to the Speedy Trial Act.") (citing *United States v. Tinklenberg*, 563 U.S. 647, 660 (2011)).

Although the time between filing and hearing does not have to be "reasonably necessary" in order to be excluded, the time does happen to have been reasonably necessary here. The parties have been vigorously litigating this complex case throughout the time that the motions in limine have been pending. *See* Doc. [242] (noting that the parties "have filed approximately 20 substantive pretrial motions" involving "many novel legal issues" and finding that, given the case's complexity, "it is unreasonable to expect adequate

IT IS FURTHER ORDERED that the jury trial in this matter is set for **May 13, 2024, at 9:00 a.m. in Courtroom 16-North**. A separate order setting pretrial deadlines will issue.

IT IS FINALLY ORDERED that any appeal from this Order must be filed within 14 days as required by Federal Rule of Appellate Procedure 4(b)(1)(A)(i).

Dated this 10th day of April, 2024.

/a/ Sarah E. Pitlyk
SARAH E. PITLYK
UNITED STATES DISTRICT JUDGE

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preparation for pretrial proceedings or for the trial itself within the time limits established by the Speedy Trial Act"). Defendants have not raised any concerns about withholding resolution of the motions in limine until before the trial, despite being invited to object. *See* Doc. [226] at 86. Motions in limine are customarily resolved shortly before trial and after any potentially dispositive pretrial motions have been resolved. It would have been especially imprudent to do otherwise here, given Defendants' declared intent to pursue an interlocutory appeal of the denial of one such motion. *See* Doc. [253]. And, in the event that Defendants do not appeal the denial of that motion, the time between the resolution of their dispositive motions and the hearing on their motions in limine (one week) is not substantial. Therefore, the time between November 22, 2022, and April 17, 2024, is excluded from the Speedy Trial Act calculation. *See* 18 U.S.C. § 3161(h)(1)(D).

APPENDIX C — RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D — TRANSCRIPT OF RECORD TO BEAVERS V. HENKEL, SUPREME COURT OF THE UNITED STATES, NO. 535 OCTOBER TERM 1903

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 535. [234]

GEORGE W. BEAVERS, APPELLANT,

vs.

WILLIAM HENKEL, UNITED STATES MARSHAL IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JANUARY 4, 1904.

(19,186.)

Appendix D

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Appendix D

United States Circuit Court for the Southern District of New York.

To the circuit court of the United States for the southern district of New York:

The petition of George W. Beavers respectfully shows:

I. That your petitioner is a citizen of the United States and is imprisoned and restrained of his liberty in the custody of William Henkel, marshal of the United States for the southern district of New York, in the borough of Manhattan, city of New York, southern district of New York, and within the space of twenty miles here-from, and held under color of authority of the United States, as evidenced by a warrant of removal under section 1014 of the Revised Statutes of the United States, dated November 10th, 1903, signed by Hon. George C. Holt, judge of the district court of the United States for the southern district of New York, and has been committed and is detained under and by virtue of said warrant, and not by virtue of any judgment, decree, or final order thereof; a copy of such warrant being hereto annexed marked Exhibit 1.

II. That the pause or pretence of the imprisonment of your petitioner according to the best of his knowledge and belief, is that a warrant for his arrest was issued by Samuel M. Hitchcock, Esq., United States commissioner and that subsequent to the issuance of said warrant an alleged commitment was endorsed thereon by said United States commissioner, to await the order of the

United States district judge; copy of which said warrant to apprehend together with said endorsement is hereto annexed and marked Exhibit 2, and made a part hereof. That said warrant to apprehend was issued by said commissioner as aforesaid upon the complaint of one Frank E. Little verified September 3rd, 1903, a copy of which is hereto annexed and is marked Exhibit 3, and, made a part hereof. That in said complaint the said Frank E. Little referred to a copy of a bench warrant issued by Hon. Judge Thomas in the eastern district of New York, a copy of which is hereto annexed and marked Exhibit 4, and made a part hereof; and a paper purporting to be a certified copy of an indictment alleged to have been found in the eastern district of New York by the Federal grand jury thereof on July 23rd, 1903, purporting to charge the said petitioner George W. Beavers with the commission of a crime against the United States, a copy of which alleged indictment is hereto annexed and marked Exhibit 5 and made a part hereof.

III. That the said defendant is restrained of his liberty without due process of law; that the alleged process under which he is held is wholly void and without force or effect; that his said restraint is illegal and in violation of the rights insured and guaranteed to him under the Constitution of the United States of America.

IV. That the said complaint made as aforesaid by Frank E. Little, a copy of which is hereto annexed and marked Exhibit 3 fails to state any facts whatever which did or could confer upon the said commissioner any jurisdiction to issue the said warrant, a copy of which is

hereto annexed and marked Exhibit 2. That it appears from said complaint that each allegation thereto is made upon information and belief and that the source of the affiant's knowledge and the grounds of his belief are insufficiently set forth to confer jurisdiction upon said commissioner. That the warrant issued by Hon. Judge Thomas, a copy of which is hereto annexed and marked Exhibit 4, was and is void upon its face and could and did confer no jurisdiction upon the said commissioner to entertain the proceedings had before him. That said warrant fails to charge your petitioner with the commission of any crime against the United States; and the warrant issued by the Hon. Commissioner Samuel M. Hitchcock, a copy of which is hereto annexed, marked Exhibit 2, is likewise void for its failure to charge your petitioner with the commission of a crime or offense against the United States, triable in the circuit court for the eastern district of New York. That on the alleged hearing had before the honorable commissioner no evidence was adduced which established or tended to establish probable cause to believe the defendant guilty of the offense sought to be charged in the alleged indictment heretofore referred to; that the paper purporting to be a certified copy of an indictment and received in evidence by said commissioner constitutes no proof or evidence either of the facts therein alleged or of probable cause to believe that such facts are true; that the said paper purports to be a certified and not an exemplified copy; that it is inconsistent, contradictory and ambiguous and is not a clear or consistent statement of facts, and that the names of no witnesses are endorsed thereon. That the commitment by the said commissioner hereto annexed and marked Exhibit 2, is illegal and void

upon the face, in that it does not comply with sections 208 and 214 of the New York Code of Civil Procedure and that the commitment and the order of removal of your said petitioner issued upon the alleged proof submitted to the said commissioner are violative of the provisions of the United States Constitution which provide, first, "No warrant shall issue but upon probable cause supported by oath or affirmation," second "No person shall be deprived of life, liberty or property without due process of law."

IV. That the circuit court of the eastern district of New York is without jurisdiction to try the defendant for the offense charged in the said indictment. That at the several times therein mentioned your petitioner was not within the eastern district of New York but was and for a long time prior and subsequent to the said several dates mentioned therein continually within the city of Washington, District of Columbia, which is not within the eastern district of New York. That your petitioner has been deprived of the rights accorded to him by the Constitution of the United States, in that he has been denied the right to be confronted with his accusers and to cross-examine witnesses in his behalf and the right of compulsory process; and the reasonable opportunity to compel the attendance of witnesses and the production of documents to establish the total want to probable cause to believe your petitioner guilty of the crime charged or any other crime has also been denied him. All of which appears more particularly from the stenographic minutes of proceedings before said commissioner, a part of which is hereto annexed and marked Exhibit 6.

V. That as your petitioner is informed by his counsel and verily believes no warrant should have issued directing the removal of an accused person to stand trial upon an indictment so fatally defective as to matters of substance as to be utterly insufficient to sustain a judgment of conviction after the interposition of a demurrer. That the indictment on which it is sought to remove your petitioner is fatally defective and bad for duplicity in that it charges your petitioner clearly, distinctly and sufficiently in each of the six separate counts thereof with the commission of more than one crime, to wit, four crimes. That the restraint of your petitioner as aforesaid is in violation as aforesaid, of the provisions of the Constitution of the United States and the laws thereof, and particularly section 1014 of, the Revised Statutes of the United States. That the alleged copy of the indictment was incompetent as evidence of the facts therein averred because it was not an exemplified or sworn copy and because it was found in the testimony of witnesses who were in the commissioner's presence and who might have testified but were not allowed to testify in regard to the matters therein averred.

VI. That your petitioner has duly objected to the continuance of any proceedings under the said complaint and warrant before the said United States commissioner and has moved for the dismissal thereof on the ground that the said commissioner had no authority or jurisdiction to proceed therewith on the grounds aforesaid or any provision of the Constitution of the United States or the laws thereof and that said objections have been overruled.

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VII. That the cause or pretence of the imprisonment and restraint of your petitioner is that a charge has been made against him as set forth in the annexed complaint and warrant and commitment and order of removal.

Wherefore your petitioner prays that a writ of *habeas corpus* issue directed to the person having your petitioner in custody commanding him to bring the body of your petitioner before this court forthwith; and further that a writ of certiorari be directed to the said Hon. Samuel M. Hitchcock, United States commissioner as aforesaid in aid thereof and to Thomas Alexander, clerk of the district court of the United States for the southern district of New York, commanding that they return all proceedings against your petitioner to this court forthwith for such action as may be proper in the premises.

Dated November 10th, 1903.

GEORGE W. BEAVERS, *Petitioner.*

MORGAN & SEABURY,
Attorneys for Petitioner.

Office and P. O. address, 290 Broadway, borough of Manhattan, New York city.

UNITED STATES OF AMERICA,
Southern District of New York,
County of New York, } *ss:*

Appendix D

George W. Beavers, being duly sworn, deposes and says, that he has read the foregoing petition and knows the contents thereof; and that the same is in all respects true.

GEORGE W. BEAVERS.

Subscribed and sworn to before me this 16th day of Nov. 1903.

WILLIAM H. LEARY,
[SEAL.] *Notary Public, N. Y. Co., No.* 115.

EXHIBIT 1.

The President of the United States of America to the marshal of the United States for the southern district of New York and to his deputies or any or either of them:

Whereas, one George W. Beavers has been arrested and imprisoned in this district by Samuel M. Hitchcock, *an* United States commissioner for the southern district of New York for an offence alleged to have been committed in another district, that is to say for having on the 25th day of July in the year one thousand nine hundred at the eastern district of New York, in the borough of Brooklyn, being at the time an officer of the Government of the United States that is to say superintendent of salaries of allowances in the office of the First Assistant Postmaster General of the United States in the city of Washington, District of Columbia, and as such officer being duly

charged among other things with the consideration of allowances for expenditures and with the procuring of contracts for supplies and with making purchases of supplies in pursuance of rules and regulation of which the said Beavers had notice and in pursuance of the fraudulent agreement theretofore made by the said Beavers with the Edward J. Brant-Dent Company, whereby the said Beavers was to recommend and procure contract for the purchase from said company by the said Postmaster General, for the use of the department of 250 automatic cashiers upon conditions that said Beavers out of the monies received by said company from such purchase should receive a certain portion and in pursuance of said fraudulent agreement and because of his having contrary to his said duties and trust fraudulently procured and aided in procuring for the said company the business and contract aforesaid, and the said company had furnished said cashiers to the said Post Office Department and had been paid for the same the said Beavers did on said day and place while still being such officer receive from said company the sum of $810.00 as the consideration of his having procured the business and contract aforesaid for the said Edward J. Brandt-Dent Company as by reference to the original warrant of arrest and the commitment endorsed thereupon which are hereto attached, will more fully and at large appear; and

Whereas the said eastern district of New York is that in which trial of said offence is to be had and the United States attorney of this district having applied to me for a warrant of removal under the provisions of section 1014 of the Revised Statutes of the United States.

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Now, therefore, you are hereby commanded, in the name of the President of the United States of America, to remove the said George W. Beavers forthwith to the eastern district of New York, and to safely deliver him to the marshal of said district or to such person as shall be by the said marshal deputized to receive him.

Given under my hand this 10th day of November, in the year one thousand nine hundred and three.

GEO. C. HOLT,
United States District Judge,
Southern District of New York.

Attest: ___ ____ , *Clerk.*

The marshal is directed not to execute this warrant until 5 p. m. this day November 10th, 1903.

GEO. C. HOLT, *J.*

(Endorsements on back.)

U. S. Circuit Court.

The United States of America

vs.

George W. Beavers.

Warrant of removal.

HENRY L. BURNETT,
U.S. Attorney.

Appendix D

I do hereby acknowledge the receipt from William Henkel, United States marshal for the southern district of New York, of the body of the within-named George W. Beavers, together with a copy of the within warrant.

Dated, Brooklyn, N. Y. ___ 1903.

___ ____,
U. S. Marshal.

I do hereby certify that there was this day filed in my office the original warrant of removal, of which the within is a copy.

Dated Brooklyn, N. Y. ___ 1903.

___ ____,
Clerk, of the United States Circuit Court for the Eastern District of New York.

EXHIBIT No. 2.

The President of the United States of America to the marshal of the United States for the southern district of New York, and to his deputies or any or either of them:

Whereas complaint on oath hath been made to me charging that George W. Beavers did on or about the 25th day of July, in the year one thousand nine hundred at the eastern district of New York in the borough of Brooklyn, being at the time an officer of the Government

of the United States, that is to say, superintendent of salaries and allowances in the office of the First Assistant Postmaster General of the United: States at the city of Washington, District of Columbia, and as such officer being duly charged among other things with the consideration of allowances for expenditures and with the procuring of contracts for supplies and with making purchases of supplies, in pursuance of rules and regulations of which said Beavers had notice, and in pursuance of a fraudulent agreement theretofore made by the said Beavers with the Edward J. Brandt-Dent Company, whereby the said Beavers was to recommend and procure a contract for the purchase from said company by the said Postmaster General for the use of the department of 250 automatic cashiers upon condition that said Beavers out of the monies received by said company from such purchase should receive a certain portion, and in pursuance of said fraudulent agreement and because of his having contrary to his said duties and trust, fraudulently procured and aided in procuring for the said company the business and contract aforesaid and the said company had furnished said cashiers to the said Post Office Department and had been paid for the same the said Beavers did on said day and place while still being such officer receive from said company the sum of $810, as the consideration of his having procured the business and contract aforesaid for the said Edward J. Brandt-Dent Company.

Against the peace of the United States and their dignity and against the form of the statute of the United States in such case made and provided, and an indictment having been found against said Beavers in the said eastern

district of New York upon the said charge and a bench warrant thereon having been issued by Hon. Edward B. Thomas, judge therein, and the said Beavers being now within the southern district of New York,

Now, therefore, you are hereby commanded, in the name of the President of the United States of America, to apprehend the said George W. Beavers, and bring his body forthwith before me, or some judge or justice of the United States wherever in the State of New York he may be found, that he may then and there be dealt with according to law for the said offense.

Given under my hand and seal this 3rd day of September in the year of our Lord one thousand nine hundred and three.

SAM'L M. HITCHCOCK,
[SEAL.] *United States Commissioner for the Southern District of New York.*

HENRY L. BURNETT,
United States Attorney.

Endorsements on commissioner's warrant.

Removal sec. 1781 R. S. U. S. No. L.

U. S. Circuit Court.

THE UNITED STATES OF AMERICA

against

GEORGE W. BEAVERS.

Appendix D

Warrant to apprehend.

HENRY L. BURNETT,
United States Attorney.

I hereby depute McAviney to execute the within process.

Dated New York, Sept. 8, 1903.

WM. HENKEL,
U. S. Marshal.

No. 6537.

The within writ was received Sept. 8, 1903 and the sane was executed by arresting the within named George W. Beavers of September 8, 1903 and I hereby now produce his body before Com'r Hitchcock as therein commanded.

Sept. 8, 1903.

WM. HENKEL,
U. S. Marshal for the S. Dist. of N. Y.

Defendant arraigned. Examination demanded. Identity established. Hearing adjourned to Sept. 15, 1903 at 10 a. m. Discharged on bail $5,000. Sept. 8, 1903.

S. M. HITCHCOCK,
U. S. Comm.

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Sept. 15, 1903.—Hearing had and further hearing adj'd to Sept'r 18, 1903, 10 a. m.

S. M. HITCHCOCK,
U. S. Comm.

Further hearing adj'd to Sept'r 22d, 1903,10 a. m.

SAM'L M. HITCHCOCK,
U. S. Comm.

Further hearing adjourned to Sept'r 25th, 1903, 10 a. m. Sept. 22, 1903.

SAM'L M. HITCHCOCK,
U. S. Comm.

Further hearing adjourned to October 5th, 1903, 10 a. m. Sept'r 25, 1903.

SAM'L M. HITCHCOCK,
U. S. Comm.

Further hearing adjourned to Oct'r 15, 1903, at 10:30. Oct'r 5, 1903.

SAM'L M. HITCHCOCK,
U. S. Comm.

Attdg. hearing—adj'd to Oct. 23, 1903 at 10 a. m. Oct. 15, 1903.

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SAM'L M. HITCHCOCK,
U. S. Comm.

Attdg. and further hearing adj'd to 28th Oct'r 10:30 a. m. Oct. 23, /03.

SAM'L M. HITCHCOCK,
U. S. Comm.

Attdg.—further adj'd to Nov'r 8th, 1903 10:30 a. m. Oct'r 28, 1903.

SAM'L M. HITCHCOCK,
U. S. Comm.

Attending and hearing closed. The defendant is committed to the custody of the United States marshal for the southern district of New York to await the order of the United States district judge, there appearing to be probable cause to believe the defendant George W. Beavers to be guilty of the offense charged in the complaint herein.

Dated New York, Nov. 2nd, 1903.

SAM'L M. HITCHCOCK,
U. S. Commissioner

Held in $5,000 bail pending decision on application for warrant of removal.

Nov. 2, 1903.

Appendix D

GEO. C. HOLT, *J.*

Prisoner released on bail. Nov. 2, 1903.

GEO. C. HOLT, *J.*

EXHIBIT 3.

Approved: Henry L. Burnett, U. S. attorney.

United States District Court,
Southern District of New York.

UNITED STATES *vs.* GEORGE W. BEAVERS.	}	Removal, Sec. 1781, R. S. U. S.

UNITED STATES OF AMERICA, *Southern District of New York*,	}	*ss:*

Frank E. Little, being duly sworn says, that he is a United States post office inspector and further says on information and belief:

That heretofore and on the 25th day of July, in the year of our Lord one thousand nine hundred, one George W. Beavers, was an officer of the Government of the United States, that is to say, superintendent of salaries and allowances in the office of the First Assistant Postmaster General of the United States, in the city of Washington,

in the District of Columbia; that by reason of his being such officer, under the laws and regulations in force for the government of the Post Office Department of the United States and the conduct, of its officers and clerks, the said George W. Beavers was charged, amongst other things, with the consideration of allowances for expenditures and with the procuring of contracts with and from persons proposing to furnish supplies to the said Post Office Department involving outlay and increase of expenditure of the monies of the said United States appropriated by law for the service of the said department, and also with making purchases and supplies for the said department from the money so appropriated as aforesaid, and procuring contracts to be made by the First Assistant Postmaster General with those persons pertaining to such purchases, and with procuring such supplies by purchases or contracts, at the places and in the manner in which such supplies are usually bought and sold between individuals, of which regulations the said George W. Beavers had then and there notice, and in performing such duties to guard the interests of the United States and observe the laws and regulations aforesaid in securing as favorable terms as possible in making such contracts and in purchasing such supplies, which duties and regulations are more particularly set forth in the first count of the indictment against the said George W. Beavers, filed July 23rd, 1903 in the United States circuit court for the eastern district of New York, which is hereto annexed, marked Exhibit A and a certified copy of which is made a part of this complaint and to which for more particularity reference is hereby made. That the said George W. Beavers at the said time in the borough of Brooklyn in the city and State

of New York, and in the eastern district of New York, had made a fraudulent agreement with the Edward J. Brandt-Dent Company, a corporation then and there existing under that name and then and there engaged in the business of selling so-called Brandt—automatic cashiers, whereby the said George W. Beavers, as such officer as aforesaid, was to recommend to the said First Assistant Postmaster General the order and purchase of two hundred and fifty automatic cashiers for the use of the said Post Office Department of the United States and to procure a contract for the same for the said company, which automatic cashiers were to be paid for out of the monies appropriated, as aforesaid, upon condition that the said Edward J. Brandt-Dent, Company should give to the said George W. Beavers for his private use and benefit certain portions of the monies which should be paid to the said company for the furnishing of the said automatic cashiers.

That on said 25th day of July, 1900, in the borough of Brooklyn, aforesaid, in the said eastern district of New York, the said George W. Beavers, in pursuance to said fraudulent agreement, and because of his having contrary to his said duties and trust, fraudulently procured and aided in procuring for the said Edward J. Brandt-Dent Company the business and contract aforesaid, and the said company had furnished said cashiers to the said Post Office Department and had been paid for the same at the rate of one hundred and fifty dollars each, did unlawfully while still being such officer as aforesaid, receive from the said company certain money, to wit, the sum of eight hundred and ten dollars, in the form of a check made by

one Edmund H. Driggs upon the First National Bank of Brooklyn, which was then and there of the value to the said George W. Beavers of eight hundred and ten dollars, and that the said check was, as the said George W. Beavers then and there well knew, money and consideration for his having procured the business and contract set forth in the said count of said indictment, for the said Edward J. Brandt-Dent Company, all of which was against the peace of the United States of America and their dignity and contrary to the form of the statute of the said United States in such case made and provided, and as is set forth in Exhibit A hereinbefore referred to.

That thereafter and at the July term of the grand inquest of the United States, held in and for the eastern district of New York an indictment was found by the grand jurors charging the said George W. Beavers, amongst other things, with the offense hereinbefore set forth, that is to say, with the offense contained in said indictment, to which reference is here made and which is hereby attached and hereinbefore referred to as Exhibit A.

That thereafter and on or about the 14th day of August, 1903, a bench warrant was issued upon said indictment by the Hon. Edward B. Thomas, the United States judge, sitting in the circuit court of the United States for the said southern district of New York, for the arrest of the said George W. Beavers, a certified copy of which bench warrant is hereto attached and which is marked Exhibit B; and that the said George W. Beavers has not been found within the eastern district of New York and is not within said district.

That as your deponent is informed and verily believes, the said George W. Beavers is now within the city of New York and borough of Manhattan, and southern district of New York.

FRANK E. LITTLE.

Sworn to before me this 3rd day of September, 1903.

SAM'L M. HITCHCOCK,
U. S. Comm.

UNITED STATES OF AMERICA,
Southern District of New York, } *ss:*

Frank E. Little being duly sworn, says, that he is the petitioner who has made the foregoing affidavit and petition; that he has read the same and knows the contents thereof; and that the same is true except such allegations as are stated to be made on information and belief, and as to those matters he believes it to be true.

Deponent further says that the sources of his information are the official documents with reference to the making of the said contract and the said transactions on file in the records of the United States of America and in the Post Office Department thereof and letters and communications from the Edward J. Brandt-Dent Company with reference to the said contract, and from the indictment, a certified copy of which is referred to in said affidavit as Exhibit A and the bench warrant therein referred to as Exhibit B and from personal conversations

with the parties who had the various transactions with the said George W. Beavers in relation thereto; and that his information as to the whereabouts of the said George W. Beavers is derived from a conversation had with the said George W. Beavers in said southern district of New York in the past few days and from the certificate of the United States, marshal for the eastern district of New York, endorsed on said warrant.

FRANK E. LITTLE.

Sworn to before me this 3rd day of September, 1903.

SAM'L M. HITCHCOCK,
U. S. Comm.

EXHIBIT 4.

UNITED STATES OF AMERICA,
Eastern District of New York, } *ss:*

I, B. Lincoln Benedict, clerk of the circuit court of the United States of America for the eastern district of New York, do hereby certify that the warrant annexed to this certificate is a true copy of the original on file and remaining of record in my office and of the return of the U. S. marshal thereon.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the borough of Brooklyn, city of New York, in the eastern district of New York, this

3rd day of September, in the year of our Lord one thousand nine hundred and three.

B. LINCOLN BENEDICT, *Clerk.*

[Seal as in certificate on indictment.]

EXHIBIT 4.

To the marshal of the United States of America for the eastern, district of New York, and to his deputies or any or either of them:

Whereas, at a circuit court of the United States of America, for the eastern district of New York, began and held at the borough of Brooklyn, city of New York within and for the district aforesaid, on the 22nd day of July, in the year of our Lord one thousand nine hundred and three, the grand jurors in and for the said district brought into the said court a true bill of indictment against George W. Beavers for having on the 25th day of July, 1900, he the said George W. Beavers being then and there an officer in the employ of the Government of the United States, received compensation, that is to say, a check for the sum of eight hundred and ten dollars, wilfully, knowingly and unlawfully; from the Edward J. Brandt-Dent Company in payment for services for procuring a contract from the United States Government for the purchase of 250 Brandt automatic cashiers by the said United States Government, the said check being drawn by one Edmund H. Driggs upon the First National Bank of Brooklyn to the order of the said George W. Beavers; as by the said indictment

now remaining on file and of record in the said court, may more fully appear; to which indictment the said George W. Bearers has not yet appeared or pleaded.

Now therefore you are hereby commanded, in the name of the President of the United States of America to apprehend the said George W. Beavers and him bring before the said court at the United States court room in the borough of Brooklyn, city of New York, to answer the indictment aforesaid.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the borough of Brooklyn, city of New York, the 14th day of August, in the year of our Lord one thousand nine hundred and three.

B. LINCOLN BENEDICT, *Clerk.*

WILLIAM J. YOUNGS,
U. S. Attorney.

(Endorsements on bench warrant.)

On first division of back:

The within defendant not found.

CHARLES J. HAUBERT,
U. S. Marshal.

September 3, 1903.

On second division of back:

Appendix D

EXHIBIT B.

United States Circuit Court.

The United States Of America

vs.

George W. Beavers.

Indictment.

Bench warrant.

WILLIAM J. YOUNGS,
U. S. Attorney.

EXHIBIT 5.

UNITED STATES OF AMERICA,
Eastern District of New York, } *ss:*

I, B. Lincoln Benedict, clerk of the circuit court of the United States of America for the eastern district of New York, do hereby certify that the paper annexed to this certificate is a true copy of the original indictment on file and remaining of record in my office.

Seal of the Circuit Court,
Eastern District of New York.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed at the borough of Brooklyn, city of New York, in the eastern district of New York this 3rd day of September in the year of our Lord, one thousand nine hundred and three.

B. LINCOLN BENEDICT, *Clerk.*

EXHIBIT 5.

In the Circuit Court of the United States of America for the Eastern District of New York, of the July Term, in the Year of Our Lord Nineteen Hundred and Three.

EASTERN DISTRICT OF NEW YORK, *ss:*

The grand jurors for the United States of America inquiring for the eastern district of New Yolk, upon their oath present, that George W. Beavers late of the borough of Brooklyn, in the district aforesaid before and on the 25th day of July, in the year of our Lord, nineteen hundred, was an officer of the Government of the said United States, that is to say, superintendent of salaries and allowances in the office of the First Assistant Postmaster General of the United States of the city of Washington in the District of Columbia; that he, the said George W. Beavers, by reason of his being such officer, under the laws and the regulations theretofore and then pursuant to law prescribed and promulgated by the Postmaster General of the United States for the government of the Post Office Department of the said United States and the conduct of its officers and clerks, and then in force, was

charged amongst other things, with the consideration of allowances for miscellaneous and incidental expenditures of, and with the procuring of contracts and undertakings with and from persons proposing to furnish supplies to, the said Post Office Department, involving outlays and increase of expenditures of the monies of the said United States appropriated by law for the service of the said department and also of making purchases of supplies for the said department out of said monies so appropriated as aforesaid and procuring contracts to be made by the said First Assistant Postmaster General with those persons pertaining to such purchases, at the places and in the manner in which such supplies are usually bought and sold between individuals,—of the prescribing and promulgating of which said regulations he the said George W. Beavers then and there had notice; and that, by reason of his being and acting as such officer,—did then and there became and was the duty of the said George W. Beavers, when discharging the duties with which he was so charged as aforesaid, to carefully guard the interests of the United States, and observe the laws thereof and the regulations aforesaid, to secure, by all reasonable means and in the manner provided by law and the regulations aforesaid, terms as favorable to the said United States as possible when making contracts with and procuring undertakings from persons proposing to furnish supplies for the said department involving outlays and increases of expenditures of the monies appropriated as aforesaid, and to obtain by purchase or contract such supplies, out of the same monies as cheaply as possible, by all reasonable means and in the manner provided by law and the regulations aforesaid; and that, because as

the grand jurors aforesaid, upon their oath aforesaid, charge the fact to be, special trust and confidence were reposed in the said George W. Beavers by his superior officers, the Postmaster General and the First Assistant Postmaster General of the United States, by reason of his being such officer of the Government and it then and there also became and was the duty of the said George W. Beavers under the law and the said regulations, to faithfully and truthfully advise his said superior officers concerning all the matters requiring. their supervision and notice, and pertaining to the discharge of his, the said George W. Beavers's said duties, and to inform them truly concerning all allowances for the incidental expenditures and contracts and purchases considered by him in the discharge of his said duties, and concerning all bills rendered against the said United States and the said Post Office Department in connection with such allowances, contracts and purchases, and especially in connection with the purchase of automatic cashiers for the use of said department, and of post offices under the same.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that, on the said twenty-fifth day of July in the year of our Lord nineteen hundred, at Brooklyn, aforesaid, in the said eastern district of New York, the Edward J. Brandt-Dent Company, was a corporation then and there existing under that name, and was then and there engaged in the business of selling, so-called Brandt automatic cashiers, and then and there had made a fraudulent agreement with the said George W. Beavers, officer as aforesaid, whereby the said George W. Beavers was to recommend to the First Assistant

Postmaster-General the ordering and purchasing of a large number, to wit, two hundred and fifty, of the said automatic cashiers, for the use of the said Post Office Department, and thereby procure and aid in procuring for the said Edward J. Brandt-Dent Company the business of and contract for furnishing the said automatic cashiers to the said Post Office Department to be paid for out of the monies appropriated as aforesaid, upon condition that the said Edward J. Brandt-Dent Company should give to him, the said George W. Beavers, for his private use and benefit, from time to time as the said Edward J. Brandt-Dent Company should receive the same, some considerable portion (the exact proportion whereof is to the said grand jurors unknown), of the monies which should be paid to the said Edward J. Brandt-Dent Company on account of, the furnishing of said automatic cashiers; and, further, that on the twenty-fifth day of July, in the said year aforesaid, at Brooklyn aforesaid, in the said eastern district of New York, the said George W. Beavers, in pursuance to the said fraudulent agreement, and because of his having, contrary to his said duties and trust, fraudulently procured and aided in procuring for the said Edward J. Brandt-Dent Company the business and contract aforesaid, and because the said Edward J. Brandt-Dent Company had under that contract furnished the said automatic cashiers to the said Post Office Department, and had been paid for the same, at the rate of one hundred and fifty dollars each, out of the moneys so appropriated as aforesaid, unlawfully did, while still being such officer as aforesaid, take and receive from the said Edward J. Brandt-Dent Company, certain money, to wit, the sum of eight hundred and ten dollars; and that the said money was, as he the said George W. Beavers

then and there well knew, money and consideration for his having procured the said contract for the said Edward J. Brandt-Dent Company as aforesaid; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

2. And the said grand jurors aforesaid, upon their oath aforesaid, do further present, that the said George W. Beavers, on the said twenty-fifth day of July, in the same year of our Lord nineteen hundred, was an officer of the Government of the said United States, that is to say, superintendent, of salaries and allowances in the office of the First Assistant Postmaster General of the said United States, as in the first count of this indictment set forth, and was, by reason of his being such officer, charged with the trust and duties in the said first count mentioned, and, under the circumstances therein set forth, and in pursuance of the fraudulent agreement therein mentioned, had procured and aided in procuring for the said, The Edward J. Brandt-Dent Company the business of and contract for furnishing a large number, to wit, two hundred and fifty other automatic cashiers, of the kind described in the said first count, upon the condition in the same count mentioned, and, because the said Edward J. Brandt-Dent Company had, under the last mentioned contract, furnished the automatic cashiers last aforesaid to the said Post Office Department, and had been paid for the same at the rate of one hundred and fifty dollars each, out of the moneys appropriated as in the said count aforesaid, unlawfully did, while still being such officer as aforesaid, take and receive from the said Edward J. Brandt-Dent Company certain valuable property and

consideration, to wit: a check drawn by one Edmund H. Driggs upon the First National Bank of Brooklyn aforesaid, for the payment of eight hundred and ten dollars to the order of the said George W. Beavers, and of the value of eight hundred and ten dollars; and that the said check was, as he the said George W. Beavers then and there well knew, consideration for his having procured the business and contract in this count of this indictment mentioned for the said Edward J. Brandt-Dent Company; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

3. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the said George W. Beavers, on the said twenty-fifth day of July in the same year of our Lord nineteen hundred, was an officer of the Government of the said United States, that is to say, superintendent of salaries and allowances in the office of the First Assistant Postmaster General of the said United States, as in the first count of this indictment set forth and was by reason of his being such officer charged with the trust and duties in the first count mentioned, and, under the circumstances therein set forth, and—pursuance to the fraudulent agreement therein mentioned, had procured and aided in procuring for the said Edward J. Brandt-Dent Company the business of and contract for furnishing a large number, to wit, two hundred and fifty, other automatic cashiers, of the kind described in the said first count, upon the condition in the same count mentioned, and, because the said Edward J. Brandt-Dent Company had under the last mentioned contract,

furnished the automatic cashiers last aforesaid to the said Post Office Department, and had been paid for the same, at the rate of one hundred and fifty dollars each, out of the money appropriated as in the said first count aforesaid, unlawfully did, while still being such officer as aforesaid, take and receive from the said Edward J. Brandt-Dent Company *certain money*, to wit, the sum of eight hundred and ten dollars; and that the same was, as he the said George W. Beavers then and there well knew, money and consideration for his having procured the said contract for the said Edward T. Brandt-Dent Company as aforesaid; which said money in this count mentioned as having been received by the said George W. Beavers then and there, to wit, at the time and place, when and where the same was so received by him as aforesaid, was delivered and paid to the said George W. Beavers by the hands of one George F. Miller and the said Edmund H. Driggs who were then and there the agents of and persons acting for and on behalf of the said Edward J. Brandt-Dent Company in that transaction.

And so the grand jurors aforesaid, upon their oath aforesaid, do say, that the said George W. Beavers, at the time and place and in, the manner and form in this count of this indictment aforesaid, while being an officer of the Government of the said United States unlawfully did take and receive money from another person for procuring and aiding to procure a contract from the said Post Office Department of the said Government against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

4. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the said George W. Beavers on the twenty eighth day of November, in the same year of our Lord nineteen hundred, was an officer of the Government of the said United States, that is to say; superintendent of the said salaries and allowances in the office of the First Assistant Postmaster General of the said United States, as in the first count of this indictment set forth, and was, by reason of his being such officer, charged with the trust and duties in the said first count mentioned, and, under the circumstances therein set forth, and in pursuance to the fraudulent agreement therein mentioned, had procured and aided in procuring for the said Edward J. Brandt-Dent Company the business of and contract for furnishing a large number, to wit, two hundred and fifty, other automatic cashiers, of the kind described in the said first count, upon the condition in the same count mentioned, and because the said Edward J. Brandt-Dent Company had under the last mentioned contract, furnished the automatic cashiers last aforesaid to the said Post Office Department, and had been paid for the same, at the rate of one hundred and fifty dollars each, out of the monies appropriated as in the said first count aforesaid, unlawfully did, while still being such officer as aforesaid, take and receive from the said Edward J. Brandt-Dent Company certain money, to wit, the sum of two hundred and fifty dollars; and that the same was, and he the said George W. Beavers then and there well knew the same to be, money in consideration for his having procured the business and contract in this count of this indictment mentioned for the Edward J. Brandt-Dent Company from the Post Office Department of the Government of the said

United States; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

5. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the said George W. Beavers on the twenty-eighth day of November, in the same year of our Lord nineteen hundred was an officer of the Government of the said United States, that is to say, superintendent of salaries and allowances in the office of the First Assistant Postmaster General of the said United States, as in the first count in this indictment set forth, and was by reason of his being such officer, charged with the trust and duties in the said first count mentioned, and, under the circumstances therein set forth, and in pursuance to the fraudulent agreement therein mentioned, had procured and aided in procuring for the said Edward J. Brandt-Dent Company the business of and contract for furnishing a large number, to wit, two hundred and fifty other automatic cashiers, of the kind described in the said first count, upon the condition in the same count mentioned, and because the said Edward J. Brandt-Dent Company had, under the last mentioned contract, furnished the automatic cashiers last aforesaid to the said Post Office Department, and had been paid for the same, at the rate of one hundred and fifty dollars each, out of the monies appropriated as in the said first count aforesaid, unlawfully did while still being such officer as aforesaid, take and receive from the said Edward J. Brandt-Dent Company certain valuable property and consideration, to wit, a check drawn by one Edmund H. Driggs, upon the First National Bank of Brooklyn aforesaid, for the

payment of two hundred and fifty dollars to the order of the said George W. Beavers and of the value of two hundred and fifty dollars; and that the same was, and he the said George W. Beavers, then and there well knew the last mentioned check to be, consideration for his having procured the business and contract in this count of this indictment mentioned for the said Edward J. Brandt-Dent Company from an officer of the said United States, to wit, the First Assistant Postmaster General of the said United States; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

6. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the said George W. Beavers, on the twenty-eighth day of November in the same year of our Lord nineteen hundred, was an officer of the Government of the said United States, that is to say, superintendent of salaries and allowances in the office of the First Assistant Postmaster General of the said United States, as in the first count of this indictment set forth and was, by reason of his being such officer, charged with the trust and duties in the said first count mentioned, and, under the circumstances therein set forth and in pursuance of the fraudulent agreement therein mentioned, had procured and aided in procuring for the said Edward J. Brandt-Dent Company the business of and contract for furnishing a large number to wit, two hundred and fifty other automatic cashiers, of the kind described in the said first count mentioned, and because the said Edward J. Brandt-Dent Company had, under the last mentioned contract, furnished the automatic cashiers last aforesaid

to the said Post Office Department, and had been paid for the same at the rate of one hundred and fifty dollars each, out of the monies appropriated as in the said first count aforesaid, unlawfully did, while still being such officer as aforesaid, take and receive from the said Edward J. Brandt-Dent Company, certain moneys, to-wit, the sum of two hundred and fifty dollars; and that the same was, and he the said George W. Beavers then and there well knew, the same to be, money and consideration for his having procured the last mentioned contract for the said Edward J. Brandt-Dent Company as aforesaid; which said money in this count mentioned as having been received by the said George W. Beavers then and there, to wit, at the time and place when and where the same was so received by him as aforesaid, was delivered and paid to the said George W. Beavers by the said Edmund H. Driggs, who then and there was the agent of the person acting for and on behalf of the said Edward J. Brandt-Dent Company in that transaction.

And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said George W. Beavers at the time and place and in the manner and form in this count of this indictment aforesaid, while being an officer of the Government of the United States, unlawfully did take and receive money from another person for procuring and aiding to procure for such other person a contract from the Post Office Department of the Government of the United States; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

Appendix D

WM. J. YOUNGS,
United States Attorney,
Eastern District of New York.

Endorsement on indictment.

On second division of the back:

EXHIBIT A.

2 / 287.

United States Circuit Court,
Eastern District of New York.

THE UNITED STATES OF AMERICA.
vs.
GEORGE W. BEAVERS.
} Calendar No. 362.

Indictment.

Calendar No. 362.

Sec. 1781, R. S. U. S.

WILLIAM J. YOUNGS,
United States Attorney, Federal Building,
Brooklyn, N. Y.

A true bill.

GEORGE E. FOSTER, *Foreman.*

Filed July 23, 1903.

Appendix D

On third division of back:

August 12, 1903, United States attorney moves for bench warrant. Motion granted. Order entered. August 14, 1903. Bench warrant issued.

(Endorsed:) U. S. circuit court, southern district. In the matter of the application of George W. Beavers for the writs of *habeas corpus* and certiorari. Petition. Morgan & Seabury, attorneys for petitioner. No. 290 Broadway, borough of Manhattan, New York. N. Y. U. S. circuit court, southern district of New York, Filed Nov. 11, 1903, John A. Shields, clerk.

Appendix D

Exhibit 6

Proceedings before the Commissioner

UNITED STATES OF AMERICA,
Southern District of New York.

THE UNITED STATES
vs.
GEORGE W. BEAVERS.

Before Samuel Hitchcock, Esq., U. S. Commissioner.

NEW YORK, *September* 15, 1903.

Appearances: Henry L. Burnett, Esq., United States attorney, and Henry A. Wise, Esq., ass't U. S. attorney, for the Government, Messrs. Morgan & Seabury, by Max D. Steuer, Esq., of counsel, for the defendant.

Mr. BURNETT: I understand that on the original arraignment of the accused, evidence was introduced on behalf of the Government identifying the accused, prisoner at the bar, and also that a certified copy of the indictment was introduced, but that there was no stenographer present, no notes taken, and to the end that the record may be complete, we will now introduce evidence of identification, taken as denoted.

No objection.

Appendix D

FRANK E. LITTLE, being duly sworn, testified as follows:

Examined by Mr. WISE:

Q. You know Mr. George W. Beavers?

A. I do.

Q. How long have you known him?

A. Ten years of more.

Q. Will you state whether you know him to be the person mentioned in the indictment filed in the Kings county on the 8th day of September, 1903?

Mr. STEUER: I object to it as incompetent unless he was there and was told by the grand jury, and knew whom the grand jury indicted. How does he know?

The COMMISSIONER: I sustain that objection.

Q. I show you a copy of an indictment filed the 23rd of July, 1903, in the eastern district of New York, (handing), which charges one George W. Beavers with the commission of an offense as set out in that indictment. Will you state whether you know the George W. Beavers referred to in that indictment?

Mr. STEUER: I object to that as calling for a conclusion by the witness; and, further, on the ground that it assumes

a fact not proved, that there is a crime or accusation contained in a paper called a copy of an indictment.

Objection sustained.

Q. State whether you know the George W. Beavers referred to in that paper that you have in your hand.

Mr. STEUER: Objected to on the ground that it does not appear that he has any knowledge at all as to who is the person mentioned in that paper.

Objection overruled. Exception.

A. Yes.

Q. What Beavers is it?

A. George W. Beavers.

Q. The person in the court here now?

Mr. STEUER: I object to that on the ground that it does not appear that he has any information as to who the George W. Beavers is who is intended to be named in that paper.

The COMMISSIONER: Intended to be named: It says named.

Mr. STEUER: How is it possible for any other people but those who were there to know who was the person in

that paper? Does it appear that there is only one George W. Beavers in the United States? The witness is to testify that he is a certain individual; that at best is a guess.

The COMMISSIONER: He is asked if he knows the George W. Beavers described in that indictment.

Mr. STEUER: There is no George W. Beavers described in that indictment. There is a George W. Beavers mentioned.

Objection overruled. Exception.

A. He is here.

Q. Do you know what position under the Government George W. Beavers held?

Mr. STEUER: I object to that on the ground that it calls for the conclusion of the witness. It does not appear that he has any information, the sources of his information or the grounds of his belief.

Objection overruled. Exception.

A. He was general superintendent of the salary and allowance division of the First Assistant Postmaster General's office, Washington, D. C.

Q. At what time?

A. Up to the spring of the present year.

Q. And that is the same person who is in the court-room?

A. The same person.

Q. If you know, state where he performed his duties as such.

A. In the office of the First Assistant Postmaster General in the Post Office Department.

Q. At Washington?

A. At Washington, D. C.

Q. And is the person now arraigned before the court, of the name of George W. Beavers, the same person who occupied this position?

A. He is.

Cross-examination by Mr. STEUER:

Q. You are Mr. Frank E. Little?

A. Yes. sir.

Q. And you are the same person who verified an affidavit on the 3rd of September, 1903, before the commissioner?

A. Yes.

Q. Now, on the 3rd day of September, 1903, what position did you occupy in the United States Government?

A. Post office inspector of the United States.

Q. Had you anything to do with the department in which the George W. Beavers, concerning whom you give testimony here, was connected with?

A. I was connected with the same department; the Post Office Department.

Q. Were you connected with that department to which Mr. Beavers was assigned, that branch of the department?

A. Mr. Beavers was assistant to the First Assistant Post-master General and I was connected as a Fourth Assistant Postmaster General; both in the same building.

Q. On the 3rd day of September, 1903, did you have any personal knowledge of what Mr. Beavers had done in 1901?

A. Personal knowledge insofar as my investigation had given me information.

Q. And beyond that you had no knowledge at all concerning anything he had done?

A. Only from information.

Q. And what were the sources of your information in respect to Mr. Beavers?

A. Various.

Q. Just enumerate them for us.

Arguments of Counsel

Mr. BURNETT: I think this has gone far enough, your honor. We simply produce this witness for identification.

The COMMISSIONER: What is the purpose, Mr. Steuer?

Mr. STEUER: The purpose is to elicit from him while he is on the stand, the sources of his information upon which he made this affidavit and complaint.

Mr. WISE: I submit that the affidavit is the best evidence of that, and the certified copy of the indictment which is attached thereto and made part thereof and marked Exhibit "A." That affidavit speaks for itself as plainly as any statement the witness can make.

Mr. STEUER: If that is true, the affidavit has not impressed you very much, Mr. Wise. That is not what he relies on.

Mr. BURNETT: The main objection, and the real objection, is that they are going into the defense now. If there is any objection to the affidavit or complaint, they should raise it by motion, not by, cross-examination. It is

now simply a question of identification; not to open up a new line of defense.

Objection sustained.

Mr. WISE: If the court please, I offer in evidence a certified copy of the indictment found by the grand jury of the eastern district of New York, which is in your possession and has already been made

The COMMISSIONER: That was offered in evidence at the last hearing,

Mr. STEUER: Mr. Commissioner, I understood they were received provided the objections that were to be made to it did not to convince you that it was incompetent.

The COMMISSIONER: The objections to the receipt of the certified copy of the indictment have been considered by me and the indictment is received in evidence.

Mr. STEUER: But we have not had opportunity to state the objection. This hearing was adjourned for one week—

The COMMISSIONER: Do you object to the indictment on the ground of its insufficiency?

Mr. STEUER: As to its competency as evidence.

The COMMISSIONER: To any extent?

Mr. STEUER: If we were satisfied that there was an indictment that stated a crime as required in law, in the concise manner required in law, and that the indictment was not bad—the, paper called indictment was not bad—, if this paper was an indictment, were to be received for any evidence, it would have to be exemplified, and in the absence of exemplification it cannot be received as testimony.

The purpose of the offer of this paper is not to show that an indictment has been found. The purpose of the offer of this paper is to come within the rule that by presenting a presumptive case of guilt—is made out for the purpose of making a presumptive case of guilt—a certified copy of a paper is absolutely useless, because the rule of law requires that evidence in order to be such, in order to constitute testimony, must be accompanied by the sworn oath of somebody, and your honor will find in every one of the decisions discussing the question of the weight and the force probately considered, of a paper called an indictment is only considered when that paper shows that it was found upon oath, and is accompanied with an oath of a person that knows that it was found upon oath. Now, the manner in which it is determined as to whether or not it was found on oath is by the examination of the paper itself, and if it does not appear from an examination of the paper produced and sought to be introduced in evidence, that that paper is the result of testimony produced upon oath, then that paper is not to be received in evidence as presumptive proof of a *prima facie* case of guilt. Now then, your honor will find in express language laid down in the Green case, and the question arises whether

or not it appears by indorsement upon the paper that there was any witness before the grand jury, and in the Green case it was said that it is necessary that the paper should have contained and indorsed upon it the names of the persons who appeared before the grand jury that is supposed to have found and lodged an indictment, so that it might appear before the commissioner or committing magistrate, as the case might be, that that testimony which resulted in the making of this finding was given on oath. I think an inspection of this paper will convince your honor that there is not an indorsement of a single person on it as having appeared before the grand jury. I do not think it necessary to argue that if the grand jury had held a session without having had a single witness and had found an indictment, that that paper which is seen fit to be called by the Government or that grand jury an indictment, would not be such evidence from which would follow the presumption of guilt against any person accused, and in the absence of the indorsement of the names of the persons from whose testimony it is sought to find this indictment, why no presumption follows that it is a paper of such validity as to lend presumptive force to guilt.

Now, the second objection that I opened with is that the paper is not exemplified, and your honor will find that that is the precise point considered in the Price case, and in that case it was held that a certified copy of a paper is not sufficient, but that it must be exemplified so that it will appear that it is an indictment and not a statement by a clerk that such a paper exists in another department of the Government.

And upon these two grounds we object to the paper being considered any evidence in the case and being received as evidence in this proceeding.

Mr. BURNETT: I think your honor is so well advised, it is not necessary to go into that.

The COMMISSIONER: The objection is overruled.

Mr. BURNETT: Now, proof as to identity having been completed and the indictment received in evidence, the Government submits the case to your honor.

Mr. STEUER: We move to dismiss this proceeding on the ground that the complaint for removal is insufficient in law, first; second, on the ground that the evidence submitted in support of the complaint is insufficient in law to sustain a complaint. And we move to vacate and set aside and to dismiss the warrant on the ground that the warrant fails to state any crime. In support of the application to dismiss the complaint upon the ground that the complaint itself is insufficient, we call your honor's attention to the fact that the complaint is based upon information and belief.

That affidavit on information is made by Mr. Little, the person who gave the testimony with respect to removal, and to show your honor that that is not sufficient we call your honor's attention to a decision recorded in the 3rd of Wood's United States Circuit Court Reports where the exact question, now considered, upon a complaint based upon information and belief, was before the commissioner,

and here it was held, upon review, that that complaint was insufficient. The court said, An affidavit made absolutely upon information dereved from others whose names are not given—and your honor will observe that the names of no persons are enumerated, not a single name is furnished, either on the indictment, that is referred to—if it be an indictment at all—certainly no name is referred to in the warrant, and, of course, that is a source of information relied upon by Mr. Little—no name of any person he relied upon and whom he refers to, or documents. These documents, if they contain any name such name is not disclosed; nor is the nature or the character of the information derived from such document, given in the course of Mr. Little's affidavit; nor does Mr. Little assign the slightest reason why the originals of those documents, either exemplified or verified—a single copy of those papers—are not attached to the affidavit. And continuing the court says, But a person who swears that he has a reason to believe that that person, naming him, has committed an offense against the law does not meet the requirements of article IV of the amendments of the Constitution of the United States.

Now, I cannot conceive, except for the distinction of name as to defendant, how the complaint in the case then considered—to which I make reference—differs from the case that is now before your honor. Continuing, the court says, The probable cause mentioned in that article which is to be supported by oath or affirmation, and upon which alone a warrant can issue, must be submitted to the committing magistrate, who must judge of the sufficiency of the grounds shown for believing the accused party

guilty. In other words, if Mr. Little were to disclose to your honor from whom it is that he derives the information upon which he relies so that your honor could then judge, independent of Mr. Little's affidavit, as to whether there was information upon which he was warranted to rely, then it would be for your honor, and not until then, to say that a presumptive case had been made out. But when confronted alone by Mr. Little's affidavit that he has information upon which he believes that a certain person, naming him, is guilty of an offense charged and set out in the paper called the indictment, then, the court says, that is not sufficient before the commissioner for him to say that there is not probable cause of guilt. The magistrate before issuing a warrant should have before him the oath of the real accuser to the facts; the real accuser to the facts, not a person to whom it is whispered by the the breezes or sung by the birds, but the person who knows that somebody of his own knowledge has done something wrong. That is the person whose oath should be before the magistrate before a warrant for the apprehension of a person supposed to be guilty of the offense in the indictment, should be issued. I beg your honor to examine this case because it is precisely on a footing with the present status of the case before you, and seems to be, is a complete determination of the question to be determined.

Mr. Wise: Now, if it please the court, in reply to that statement, without referring to any decisions, I do not think that the court, or any of the parties to the other side, for a moment deny that a criminal warrant may be issued upon a complaint which is based upon information and belief, if the sources of the information and the grounds of

the belief are set forth; and that is exactly what has been done here, and has not been done by any whispering of the breezes or any such thing, but by competent legal evidence which was produced before the commissioner before the issuance of the warrant, which was a part of the complaint on which the warrant was issued, and which, by no less superior authority than that of the United States Supreme Court, has been held to be competent when it is certified by the proper officer. In the case of Green v. Henkel it was held flat-footed that the indictment in this case was *prima facie* good, and when a copy of it is certified by the proper officer the magistrate is justified in treating the indictment as an indictment found by a competent grand jury, and is not authorized to go behind it, nor a certified copy of the indictment.

The COMMISSIONER: I will not sustain your objection on that ground.

Mr. STEUER: What I addressed Mr. Wise on is where the indictment is received as *prima facie* evidence, that in those cases the indictment was indorsed by the witnesses.

Mr. WISE: The statement of the complainant was that the affidavit was based on information and belief, and that the sources of that information and the grounds of belief were set forth and incorporated in an indictment a certified copy of which was marked and made part of the complaint, and that the copy of the indictment, was certified by Mr. Benedict, who was the clerk in the district in which that indictment was found and, under the Green v. Henkel case, it is competent evidence of the fact that the indictment has been found by a competent grand

jury. On top of that, I submit that under the numerous decisions in every district— almost every district of the United States, with the exception of the southern district, and I do not even except that—that a certified copy of an indictment has been held to be sufficient *prima facie* evidence of the commission of the offense, and I believe that the Government has proceeded in a proper method.

The COMMISSIONER: The motion, as I understand it, is to dismiss the complaint on the ground of the insufficiency of the complaint itself; on the ground of the insufficiency of the evidence before the commissioner; and on the ground of insufficiency of the warrant.

Mr. STEUER: Those are the grounds on which I rely.

The COMMISSIONER: Your motion is denied.

Mr. STEUER: I only addressed your honor with respect to the complaint and not the sufficiency—

Mr. WISE: I understood you to object to the warrant and the evidence.

Mr. STEUER: I thought that Mr. Wise wanted to be heard. The only objection that I discussed before your honor was the objection to the complaint itself and its insufficiency I want now to be heard on the question or the sufficiency of the warrant.

On the question of the sufficiency of the evidence, there is before your honor what is called a certified copy

of an indictment. Now, assuming that a certified copy of an indictment not indorsed with the names of witnesses is sufficient *prima facie* evidence, then that indictment, in order to be such proof, would have to be open to no objection, because a demurrable indictment, a defective indictment, an indictment upon which a defendant would not have to stand trial, is no indictment.

The COMMISSIONER: I certainly agree with you.

Mr. STEUER: Now, that being admitted, we start on one said premise, that if this indictment is bad upon any ground upon which it could be demurred to, then this defendant upon the proof before your honor must be discharged and an order for removal should be denied.

In order to discover as to whether this indictment is good why we have to look to the law under which it is charged and of which it is charged the defendant was guilty of the offense, and that I believe is section 1781.

Mr. WISE: I understood at the opening of the hearing that no question was raised as to the sufficiency of the indictment as far as charging any crime

Mr. STEUER: Why, Mr. Commissioner, I don't believe there was such an understanding.

As we read section 1781, it charges, there is possible the commission of four separate crimes under that section, and these four crimes consist in the making of a contract; in the making of a contract with a person to lend

assistance either in procuring or in aiding to procure a contract with the United States Government for a benefit. That is to say, if Beavers, the alleged defendant, entered into a contract with an individual or a corporation. by the terms of which contract, for a consideration accruing to Beavers, he agreed, regardless of what he subsequently did, but he just made the agreement that he would either procure or aid in procuring a contract, that would be a crime, and it would not be necessary in order for Beavers to commit that crime, to afterwards either procure or aid in procuring a contract, Have I made myself clear with respect to that? So that if Beavers met, on the street or elsewhere, any individual connected with this Dent-Brand Co., and they approached Beavers with a proposition and said, now if you use your services, your good offices, your being connected with the Government—and here it appears that he is an officer of the Government—so that if as an officer of the Government be was approached by some one of this corporation and they, said, if you will use your good offices with the Government and advise the purchase of our article, we will pay you $1000, or 50 cents a barley corn, if you please, and Beavers said, I will; that is a crime right there regardless if Beavers ever after that intended to carry out that contract or not. The making of that contract is of itself a separate and distinct crime. Under the first count of the indictment you will find that the crime is distinctly stated and that it is intended to be stated that Beavers made a contract with the Dent-Brand Co., by the terms of which Beavers was to use his influence, being an officer of the Government, for the purpose of bringing about the making of a contract by this corporation with the Government.

Now then, if that is a crime under section 1781, and if the indictment charges the commission of that crime, then if in the same count the indictment charges another separate and distinct crime under section 1781 of the Revised Statutes, are we agreed that an indictment is bad for duplicity; because if we are not then it would be for me to convince your honor that where a count in an indictment states two separate and distinct crimes under one provision of law, that an indictment is bad for duplicity.

The COMMISSIONER: I shall hear you on that.

Mr. STEUER: The cases in support of the proposition that such an indictment would be void for duplicity—that is demurrable for duplicity—are all enumerated on our memoranda that was in support of that proposition, so that I will assume the conclusion of law to be made—it is either so or not so—I want to get to the point to illustrate to your honor that this indictment in its first count states at least three crimes, and not one crime, as it is required by law.

Now, under the same section 1781, it is made a crime if an officer of the Government does in fact use his good offices to bring about the making of a contract by the Government with some third person for the purchase of the article sold by that person—to come back to this case and to see what is charged in this indictment— and charging Beavers with entering into such a contract which is under the law and under that section of the law, a crime, they go on further to charge that Beavers in pursuance of the making of the contract, distinctly set out and fully charged, did on the 25th of July, 1901, advise

the First Assistant Postmaster General to purchase the goods of the Dent-Brand Co., called those goods by name, automatic cashiers. Now, then, after first charging that officer with the crime of making such a contract with. the Dent-Brand Co. they go on and charge him, under the same count, under the same provision of law, with an entirely separate and distinct crime, to wit, the crime of counselling and advising the Government to make such a contract, and the giving of that counsel and advice to the Government—which is charged as one of the duties of Beavers—if it was given in pursuance of a contract made with the Dent-Brand Co., regardless of the fact whether the Government ever entered into a contract or not, the giving of that advice and the using of his office for that corrupt purpose is under that section a separate and distinct crime; and he could be tried for that if they did not prove as a crime the making of the contract. If they said Mr. Beavers is not called to the bar to be tried for the making of the contract, the contract having been made, he in pursuance of the making of that contract, did use his offices and give that advice, then Beavers is guilty of the crime, and we see that that under section 1781 constitutes a separate and distinct crime.

Now, we see under section 1781 the third crime enumerated thus: That Beavers succeeded in his efforts and did procure through his advice and counsel, in bringing it about that that contract was actually made and entered into between the Dent-Brandt Manufacturing Co. and the United States Government for the purchase of the 250 registers.

Now, then, if Beavers never made a contract with that corporation, if Beavers never saw a soul that was connected with that corporation, but if Beavers corruptly used his position, which was to advise and counsel—as is charged in the indictment—the First Assistant Postmaster General with respect to the purchase of supplies, and he did that corruptly, and such a contract was made by the United States Government, and Beavers received part, of the money which the United States Government appropriated for that purpose and paid over; if Beavers received part of that money, the receiving of that money was a separate and distinct crime under section 1781, upon which Beavers could be called to trial. If Beavers did nothing in this transaction, if Beavers lay dormant, but Beavers only procured the appropriation to be used and paid over with the purpose and intent that he, Beavers, was to use part of that money, Beavers would be guilty of a crime under section 1781. Assuming that Beavers never made a promise to the Dent-Brandt Mfg. Co., but upon the contract he made for the purchase of those cash registers Beavers used his influence to see to it that out of the appropriation made, part of that money was paid over to this Dent-Brandt Mfg. Co., with the intent that part of it was to come back to him, then Beavers was guilty of a separate and distinct crime under section 1781.

It is charged in the first count of the indictment that such a contract was made, and that Beavers did, out of the money appropriated for the payment of those cash registers, actually receive $810, and that that money Beavers received knowing that it was part of the money appropriated by the United States for the purpose of paying for such supplies.

Now, then, there is a distinction, in the fourth crime that is charged; the difference between procuring the contract to be made, and aiding in the procuring it to be made. Your honor may deem at first that that is rather fine. I don't think there can be any doubt about the others being separate and distinct crimes, but your honor may think that it is rather fine and close-cut to say that it is one crime to procure a contract, and another crime to aid in the procuring of a contract, and I have no hesitancy in saying to your honor that I am strongly backed in this contention. The court of appeals of the State of New York said that an indictment which charged the procuring, and the aiding in the procuring, was bad for duplicity. But the court said a man could be guilty of the one without being guilty of the other, and that is the test.

Now we see that under that section it is a separate crime to procure the making of the contract, and a separate crime to aid in the procuring of the making of a contract. For instance, if Beavers said, "Upon consideration, paid to me, I will get you a contract from the United States Government for the purchase of 250 of those machines," or timing machines, and Beavers would procure the United States to make a contract with the Dent-Brandt Mfg. Co., of course that is a crime of procuring a contract to be made. If Mr. Beavers said, "I will use my influence with Mr. Jones, Brown or Smith, so that he shall procure a contract to be made," Beavers is guilty of aiding in the procuring of a contract, and the proof which would prove the procuring, would not prove the aiding in the procuring. The proof which would prove the aiding in the procuring, would not prove the procuring of the contract. And where the same proof will not prove the crime under

one section of the provision of law the indictment is bad for duplicity. Now, for those reasons that in the first count of the indictment, as well as in the second, third, fourth, fifth and sixth, there is charged more than one separate crime under one provision of law, the indictment is bad for duplicity.

We respectfully ask the dismissal of the complaint for failure.

The COMMISSIONER: Upon that question I shall reserve my decision. Go on.

Mr. STEUER: With respect to the warrant. We say that there is no charge, no sufficient statement of a crime in the warrant, and that it is necessary for the crime to be cited in the warrant, otherwise the warrant itself must be vacated and set aside.

I assume that the use of adjectives—it is thus understood in law—that the use of adjectives in an affidavit does not help to characterize the crime. For instance to call a name is not to make it that. That is a mere conclusion.

In the warrant it is stated that, commencing on the 22nd day of July in the year of our Lord one thousand nine hundred and three, the grand jurors found this indictment for having on the 25th of July, 1900

The COMMISSIONER: Do I understand that you are attacking the warrant issued in this proceeding?

Mr. WISE: You have the wrong warrant. That is the eastern district.

Mr. STEUER: I referred to—we are complaining of the warrant in the eastern district.

Mr. WISE: Admitting that the warrant is attached to the complaint; it does not make any difference at all.

Mr. STEUER: Your honor will observe that in Mr. Little's affidavit he refers to the warrant as a source of information.

Mr. WISE: Certainly, he makes an allegation in the complaint that an affidavit has been made and a warrant issued thereon, and based his information on that warrant.

Mr. STEUER: I want to say that that warrant is void, and being void it cannot afford any information.

Mr. WISE: But it was issued.

Mr. STEUER: Well, if that is all the effect of it, we don't care anything about it; but whether that warrant can be used as a basis of information by Mr. Little, then we would say, your honor, that that warrant is wholly void.

The COMMISSIONER: I don't regard the contents of the warrant as material.

Mr. WISE: In answering the argument of the defense as to the attack upon the indictment, the first

proposition which I shall observe is that where a difficult question of law like this arises as to the sufficiency of the indictment, unless the indictment is palpably worthless, the commissioner will leave that question to be passed upon, as ruled, by some court of higher authority. The commissioner is aware of the many decisions to that effect. But I do not think that there is any serious question of law involved here, or that the argument of the gentleman as to duplicity bears much weight, and I believe that if we are required, or have an opportunity, that we can submit a brief which will be equally forceful to his in showing that there is no duplicity in this indictment. If we had charged a member of Congress under this section with having attempted to procure and having procured, and having paid for procuring, there might be some question as to whether or not there would not have been some duplicity in the indictment: But this indictment is to be read as a whole. If there was a bare assertion in the indictment that on a day certain, somebody gave the defendant something and it stopped there, it would be a ridiculous indictment on its face. What did they give it to him for? They gave it to him, it is alleged for procuring, or aiding in procuring the commission of an offense under the statute, and it is absolutely necessary to show what offense he had committed in order to receive this money. You have got to read it altogether. It is not to be separated. We need not charge Beavers with any of the three items that opposing counsel has so ably separated, and hold him on any one of them, and unless the three of them are stated together, there is no offense charged, and the statement of the three offenses together makes a complete statement of exactly what offense is meant, without any duplicity at all. I think the commissioner will see that.

The COMMISSIONER: I will take your briefs on that. I think it is very important for a speedy termination of this case, for that question to be based upon.

Mr. BURNETT: Your honor, it seems to me that this matter ought to be disposed of without delay. If your honor will take the statute and read it carefully, it seems to be perfectly clear, omitting that which is irrelevant, that every officer or agent of the Government who directly or indirectly takes, receives, or agrees to receive, any money, property, or other valuable consideration whatsoever, from any person, for procuring or aiding to procure any contract, office, or place from the Government, or any department thereof, or from any officer of the United States, or from any person whatsoever; or for giving any such contract, office, or place to any person whosoever, and every person who indirectly offers—so that applies to the briber, not the bribee—now, any agent of the Government who directly or indirectly takes, receives, or agrees to receive, any money, property, or other valuable consideration from any person, for procuring or aiding to procure any contract, office or place—There is but one offense in that whole statute.

The indictment might have alleged in this form, "That an officer or agent of the Government did take or receive" for he might have put it in the other way, "That he agreed to receive and did receive," and undoubtedly that would have been a good indictment, if either the one or the other would have been proved on the trial to be good; by proving either one of the alternatives of a statute the indictment is good. That is always the law of criminal procedure, or criminal pleadings. Now, therefore, I claim that if

right, there is but one offense, the offense of agreeing to receive or receiving and you may charge either or you may charge both, and if you prove either, the offense is committed. It sets forth the offense and the penalty; two years' imprisonment, and not to exceed $10,000 of fine. That seems to be all there is to it.

The COMMISSIONER: I should like, in view of the questions raised, to consider the briefs to be submitted.

Mr. BURNETT: If your honor please, I do earnestly, on the part of the Government, protest against these delays. Large interests are involved. The people at large are interested; the Government is interested; public justice is interested. This question should be promptly determined, and the case proceeded with vigorously. It seems to me that oral argument ought to be sufficient.

The COMMISSIONER: The matter of the sufficiency of the indictment as evidence has got to be considered, and the indictment itself.

Mr. BURNETT: And yet, if your honor please, the Supreme Court of the United States held that even where the indictment is defective, the Government may supplement the indictment by further proof. That is not sufficient for the dismissal of proceedings. If there is any inconsistency or conflict in the statements of the indictment, all we need in that indictment is to substantially state the crime. It need not be technically drawn, as the court has said. It is *prima facie* evidence before you. In these cases strict technicality is not required.

Suppose, if your honor please, that there was doubt in your mind as to whether or not there was duplicity in the indictment. Is your honor going to pass on this indictment to the extent that a judge would on the bench on a trial? Is not that the proper question to raise there?

Briefs to be submitted September 16th inst.

Examination adjourned until Friday, September 18th, 1903, at 10 o'clock a. m.

Ruling of Commissioner

THE UNITED STATES
vs.
GEORGE W. BEAVERS.

NEW YORK, *September* 18, 1903.

Met pursuant to adjournment.

Present: The commissioner, Mr. Burnett and Mr. Wise, for the Government. Mr. Stotler; for the defendant.

The COMMISSIONER: I have come to a conclusion in this matter. I shall deny your motion to dismiss. I have examined your brief very carefully, but in the limited time, of course, I have not been able to prepare a written opinion if that should be desired.

The substance of my decision will be found in the case of Green vs. Henkel in the United States Supreme Court,

in which a certified copy of an indictment is specially referred to as competent evidence. The court says, "In our opinion, such an indictment is *prima facie* good and when the copy of it is certified by the proper officer, a magistrate, acting pursuant to section 1014 of the Revised Statutes, is justified in treating the instrument as an indictment found by a competent grand jury."

The objection to the sufficiency of the indictment I do not find to be well taken. Following the decision of Judge Brown in the Dana and Green cases and the case of Green vs. Henkel, from which I have just quoted, it seems clear to me that a certified copy of an indictment may be received in evidence and taken as *prima facie* proof of the facts therein contained. It is to be given weight according to the nature and character of its averments and the facts and circumstances which it sets forth. It is, therefore, in the sound discretion of the commissioner to determine, in the first instance, what weight it shall be given as evidence. If then the indictment contains a clear and sufficient statement of facts constituting the offense charged, it is to be accepted as evidence of these facts.

The question that then presents itself is whether testimony which is merely contradictory of the facts stated in the indictment will suffice to overthrow the presumption of probable cause raised by the legal evidence of facts contained in the indictment. The question of actual guilt is not before the commissioner, but the question of probable cause. In both the Dana and Green cases, decided in this district, the indictments were criticised. In the one case the indictment was held to be altogether bad, and in

the other case, insufficient in its statement of facts and circumstances to justify removal. Another feature of these cases, and also in the case of Terrell, decided by Judge Lacombe, is that it was sought to remove the defendants from their homes to far distant places for trial. This feature is enlarged upon in each of the opinions rendered. It would seem to be left, therefore, to the sound discretion of the commissioner, and of the court to determine what is "a proper case" to use the language of the decisions in which to permit a prisoner, under an indictment, in another district, in a proceeding for his removal to that district for trial, to introduce evidence merely to contradict the statements of fact contained in the indictment. If, in the exercise of such discretion, the commissioner errs as against the defendant, the case may be reviewed by the court and sent back with further instructions.

The motion is denied.

Mr. STEUER: To that we except. We now respectfully demand that the prosecution announce the names of the witnesses that appeared before the grand jury upon the finding of this indictment.

Mr. BURNETT: This is declined.

Mr. STEUER: We ask your honor to instruct the representatives of the United States Government to announce those names,

The COMMISSIONER: I decline to do so.

Mr. STEUER: To that we except. We call Miss Wren as a witness.

Mr. BURNETT: Has she been subpoenaed to come, and where does she reside?

Testimony of William Klein

WILLIAM KLEIN: sworn for the defense, testified as follows:

Examined by MT. STEUER:

Q. Where do you live Mr. Klein?

A. College Point, Long island.

Q. What is your age?

A. 24 years.

Q. How are you employed?

A. I am employed as clerk in the office of Morgan & Seabury.

Q. Do you know Miss Wren?

A. I do.

Q. When did you last see her?

A. Yesterday afternoon about one o'clock.

Q. And when, prior to that, did, you last see her?

A. It was on, the 16th of this month.

Q, At the time when you last saw her did you leave any paper with her?

A. Yes, sir.

Q. What was it?

A. A *subpoena duces tecum*, and a subpeona for her personal appearance at the examination, in this court.

Q. Today?

A. At this hearing.

Q. For, this morning at 10 o'clock?

A. Yes.

(By Mr. BURNETT:)

Q. When was that?

A. On the 16th.

(By Mr. STEUER:)

Q. Where did you see Miss Wren when you left with her the subpoena?

A. I saw her in the office of the district attorney.

Q. Whereabouts?

A. In room 11 in the Post Office building in the borough of Brooklyn.

Q. From whom had you secured that subpoena?

A. From Commissioner Hitchcock.

Q. At that time did you leave with her anything outside the subpoena?

A. I left with her $4.

Q. For what?

A. For her witness fees to appear at this hearing.

Q. Did Miss Wren say anything to you at the time when you, left that paper with her?

A- Well, she said that she would not accept the money until she had seen District Attorney Youngs.

Q. Did she see District Attorney Youngs in your presence?

A. Well, she went into his private room and came out again. She did not see District Attorney Youngs in my presence.

Q. Did District Attorney Youngs then come out to see you?

A. Yes, sir.

Q. Did he say anything to you?

A. He said to me that I should take those subpoenas back, and I said that I would not; I had served them on Miss Wren: and then District Attorney Youngs said, Well, Commissioner Hitchcock has no authority to issue subpoenas for witnesses in the eastern district, and I replied that I served the subpoenas. He then said, Well, you have served nothing: You have served pieces of paper. I then repeated that I had served these subpoenas, and them he asked Miss Wren whether she had received—had taken any money. I then interposed that I had tendered her the fee, and it was at the time lying down on her typewriter desk.

Q. She had a table there, did she?

A. She had a desk.

Q. At the place where you served her?

A. Yes, sir.

Q. And you offered this money in currency to her?

A. Yes, sir.

Q. United States currency?

A. Yes, sir.

Q. And that was permitted to remain at her disposal on that desk?

A. I laid it on her lap and it fell on the floor.

Q. And did these subpoenas call for her appearance here this morning at 10 o'clock?

A. Yes, sir.

Objected to that the subpoenas are the best evidence of their contents.

Q. Where is the original subpoena, Mr. Klein?

A. I have it (producing).

Q. And where is the original subpoena for the appearance of her person?

A. Here (producing).

Mr. STEUER: Now I offer these two subpoenas in evidence.

Marked Exhibits 1 and 2.

Appendix D

(By Mr. BURNETT:)

Q. Do you know what position Miss Wren occupies in the office of the district attorney in Brooklyn?

A. She was writing on a typewriter every time I saw her.

Q. She was employed in his office?

A. It seemed so.

Mr. BURNETT: I suggest now, Mr. Steuer, that this same question probably will come up further in another form and if you can, it might as well be all covered at the same time.

Mr. STEUER: That I should complete the evidence with reference to the other witnesses.

Mr. BURNETT: Yes.

Mr. STEUER: I Will do that.

Mr. BURNETT: You have subpoenaed the Postmaster General in Washington and you have served the district attorney himself, and if you will cover the whole ground we will present the whole matter. It seems to me that the whole question can be discussed and presented to your honor at one time.

The COMMISSIONER: Subpoenas are signed generally by the commissioner in blank, as was the case here, and upon the application of either the Government or of an attorney, and are then filed in as the parties themselves see fit.

Mr. BURNETT: I have made the suggestion that he make his proof as to the whole question. He has had his subpoenas served on the district attorney and also on the Postmaster General, whom I in this hearing represent before your honor, and I want to have the question presented fully to your honor if you desire to hear any authorities upon it, and dispose of the whole matter at one time.

The COMMISSIONER: My understanding is that the subpoena of the commissioner does not have any force outside of the district. I may be mistaken about that.

Mr. STEUER: I think your honor is in error in respect to that.

(By Mr. BURNETT:)

Q. You hold no official position Mr. Klein?

A. No, sir.

Q. You were not appointed by any judicial officer to serve these subpoenas?

A. No, sir.

Q. You acted simply as a private individual under the instructions of counsel for the accused?

A. Yes, sir.

Arguments of Counsel

Mr. BURNETT: I think we can cover the whole ground by stipulation.

It is admitted that a subpoena, in form, signed by the commissioner, was served upon William J. Youngs, who is the district attorney for the eastern district of New York, in the eastern district; and also a *subpoena duces tecum*, signed by the commissioner.

I do not think that any of these *subpoena duces tecum* are proper in the manner of service, but we admit that such a paper was served upon Mr. Youngs in the eastern district.

We admit, further, that there were similar papers served upon the Postmaster General to appear and produce certain documents and papers of the Postmaster General's office in Washington. That paper was served in Washington, and that was served by a deputy marshal of that district.

Mr. STEUER: We, of course, have served Inspectors Little and Oldfield for the last hearing and then they disappeared, but if the subpoena is good then it holds throughout the entire examination. If the subpoena is

not good, of course they never were subpoenaed. You will remember that Mr. Little was on the stand and the reason that the interrogation with respect to him was interrupted, was because I was to call him as our witness. The record discloses that.

Mr. BURNETT: We make no question about that. Were they served in this district?

Mr. STEUER: Yes, sir.

Mr. BURNETT: Then that does not fall in the same category and will come up as another question.

Now, is there anything more you want as a statement of facts?

Mr. STEUER: No; that is all.

Mr. STEUER: Now I do not like to quarrel with the finding of the commissioner with respect to what is held in the Greene case, but if I recollect the history of the Case correctly it is authority for the very proposition under discussion now. That case has its distinctive branches. There was no reversal of anything that Judge Brown said on the consideration of the original application for the removal of the accused. The application when it came up, as your honor correctly stated, was sent back on the ground that testimony had been offered to the commissioner for the purpose of rebutting the presumption raised by the introduction of a certified copy of the indictment. That testimony was rejected, and because of the fact

that the commissioner failed to receive the testimony the proceeding was remitted to the commissioner. After it was remitted to the commissioner then he took the testimony that was offered on behalf of the defence so as to show absence of probable cause of guilt, and be made a determination that there was reason to believe that a crime had been committed, and that the accused had committed that crime.

Now in that case, if you will permit me to give the history of the case correctly I will come to the direct question. After that determination had been made then it went to the district judge on review and the district judge said that after the commissioner's finding based upon evidence he would not interfere. That was reviewed before the Supreme Court and that was affirmed, but nothing that was done upon the original question as to whether or not the commissioner is bound to take testimony was in the slightest degree interfered with.

The COMMISSIONER: The Supreme Court expressly states the question is not before it as to that, because testimony had been taken.

Mr. STEUER: That is the point. What I want to emphasize is that the second determination was in no wise—if you can say that it affirmed Judge Brown, it certainly did not reverse him in the original application.

Now in that case subpoenas were issued all over the country and these subpoenas were responded to. This indeed is the first instance where the Government has

taken the position of depriving a man of the opportunity to prove at the place where every decision in this district says he should have his preliminary hearing; that is the first instance in which the Government has made this stubborn effort to suppress the evidence which would show that there is not only not probable cause of the guilt of an accused, but there is no possibility of establishing his guilt.

Now the practice we are to pursue is not any practice defined by a Federal law, except that the Federal law by a special enactment adopts the practice of the State in which the particular district is situated. In other words, we follow the practice of the State of Nov York, and your honor in issuing subpoenas takes the position of a committing magistrate of the State of New York, and wherever the committing magistrate could issue a subpoena in just that locality can your honor issue the subpoena. Now under section 608 of the Code of Criminal Procedure the subpoena of a committing magistrate goes all over the State of New York, and so the subpoena issued by your honor by that enactment giving to your honor the power to issue where he issues, goes all over the State of New York.

Now Miss Wren, under the testimony in this case, was subpoenaed across the bridge. William J. Youngs was subpoenaed across the bridge. We propose to show by Miss Wren that there was no testimony offered to the grand jury upon which they could found any indictment. We propose to show by Mr. Youngs that he has in his possession this contract that they claim was under this fraudulent agreement. We propose to show that Mr. Beavers had absolutely nothing to do with the making,

procuring or aiding in the making or procuring of such contract, and we cannot conceive who it is that the Government by this means seeks to shield under the guise of a prosecution against Mr. Beavers. Somebody else is withheld, but if we are put to it; if they really think there is such a thing as a case we propose to show that so far as Mr. Beavers is concerned there is not only lack of probable cause to believe he is guilty, but it is a clear case of absolute innocence. Why is it that the Government, admittedly in possession of all this testimony, seeks to suppress it when they say they want this hearing to go on from day to day? You recall to mind that I said I would remind the General of that expression. How we are here ready to go on from day to day. Why pocket the evidence? Why not disclose it when we are ready and willing to be bound by it. When the process of the court runs against these individuals and they practically commit a contempt of court by failing to put in, an appearance when properly served with a subpoena? I say there is no case on record where it has been held that the subpoena of a commissioner does not issue in the State; and I say there is no instance where the Government has ever seen fit to take the position of suppressing evidence, seeking to remove a man because he is here ready to prove his absolute innocence, and we ask that these people be directed to take the stand and testify and, answer such questions as are relevant upon this inquiry.

Mr. Burnett: Now if your honor please, this is a very simple matter. This party has been duly indicted in the eastern district of this State for the violation of a United States statute. Whether he is guilty of the offence

or not — should there be tried out according to the forms of procedure under the judicial system enacted by the Congress of the United States. Your honor is simply a committing magistrate sitting here to see whether there is probable cause shown for the removal of the party, for a commitment and order of removal to that district for trial. You are not here to try the case. You are not here to hear the evidence to be produced to establish his innocence or guilt. All just minded people would hope that Mr. Beavers would be able to establish before the proper tribunal, absolute innocence. The Government is quite as anxious to protect loyal and faithful servants as it is to prosecute and condemn those who betray their trust, but when they are satisfied and upon examination find *prima facie* evidence to show that those servants have been unfaithful, then it is the duty of every officer of this Government to see that that unfaithful servant is punished, and every officer of the Government is derilect in his duty when he does not bring his utmost power to bear in punishing the guilty.

Now if your honor please, there are pretty broad questions involved just here and now outside of your honor's powers in issuing *subpoenas duces tecum*. There is the general question of the relative powers of the Government. The relations of the judicial power to the executive in the administration of the Government. The Government is divided into three great powers—the executive, the legislative and the judicial, each independent within the scope of its duties of the other. One cannot usurp the functions of the other. That has been fully considered by the Supreme Court itself. Positions have been taken by the Executive, the President of the United States, denying

powers of Congress, denying powers of the judiciary to transgress those powers confided by the constitution to the Executive. Now when the executive officer, the President of the United States and his agents and servants are performing their functions even the judiciary cannot step across that line and undertake to interfere with the executive action, it seems to me it is well to consider that here. I do not know where it has been better treated than in some State cases. In a review of several of these cases in the Albany Law Journal the elementary principles involved are very well stated.

(Reading the article referred to from vol. 31 of the Albany Law Journal.)

Now there are also some very interesting cases in the State of New Jersey. These all pertain to the governor where the courts have held that he cannot be called on, nor his agents through whom he acts, but I need not go further on that ground.

Therefore, if a governor in a court of his own State cannot be called in, nor his agents through whom he acts, how much more does it apply to the President of the United States and his agents through whom he acts.

Then your honor, turning to the next point of the duties and powers of a commissioner let me say a single word. Commissioners were creatures of the law created at an early day. I think under the old judiciary act of 1789. There are, not many statutes—there is but one really; that cover the ground, viz: section 627, authorizing the

appointment of the necessary number of commissioners. Their powers are not covered by statute nor clearly defined. The case of the United States against Alreid in the 155th U. S., page 591, is the fullest on the part of the Supreme Court in its discussion of the functions and powers of commissioners that I have been able to find. Their powers are largely implied. Their judicial proceedings are not sessions of courts and a commissioner is not a court within the meaning of the third article of the Constitution.

The COMMISSIONER: That is well understood.

Mr. BURNETT: That has been decided expressly by the Supreme Court of the United States; that their functions are similar to and of the same general nature as a referee in bankruptcy and a master commissioner, except in this–

COMMISSIONER: They are arms of the court.

Mr. BURNETT: Your honor has hit it exactly; simply arms of the court and instruments of the court. Except perhaps where there has been a special duty assigned to them, as in section 1014 where they are named as one of the officers to carry into effect the duty of removal of persons from one district to another to answer for a crime, and they are also I believe given the power to examine in the Chinese exclusion cases, there are certain duties devolve upon commissioners that they may perform and they have their special powers by statute outside of being simple arms of the court.

Appendix D

In the 158th U. S. the court held that a preliminary examination before a commissioner of the circuit court is not a case pending in any court of the United States.

The COMMISSIONER: I remember that case.

Mr. BURNETT: And what followed was a consequence. The court says among other things, that a commissioner is not a judge of a court of the United States within the constitutional clause. He is simply an officer of the circuit court, appointed and removable by that court. A preliminary examination before him is not a proceeding in the court which appointed him, or in any court of the United States. Under section 1014 an examination may be had not merely before a commissioner, but also before any judge, justice or judge of the United States, or before any chancellor, judge of a State court, justice of the peace, mayor of a city or other city magistrate, and it cannot be pretended that one of these State officials while conducting a preliminary examination or investigation is holding a court of the United States. Technically we speak of an examining magistrate and not of an examining court. The distinction is recognized in the statute (1014) by which sundry judicial officers conduct an examination; also 911 which provides that all writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue and shall be signed by the clerk thereof, but a commissioner, like a justice of the peace is not obliged to have a seal and his warrants may be under his hand alone.

Now following that and based upon that the question came up before the Controller of the Currency and

he rendered this decision: The serving of a subpoena issued by a United States commissioner for a witness residing outside of the district of the commissioner is not authorized by law, and a deputy marshal is not entitled to compensation or mileage for such service, and he bases his conclusion logically, as I think, on the decision in the Supreme Court. He says section 876 of the Revised Statutes under which the claim is made by the deputy marshal for fees in the service of the subpoena in question provides that subpoenas for witnesses who are required to attend a court of the United States in any district may run in another district, but it is now well settled that a United States—

The COMMISSIONER: There is a limitation in regard to distance there too, is there not?

Mr. BURNETT: That as to subpoenas for courts in civil cases, one hundred miles. He continues, "It is now well settled that a United States commissioner is not a court of the United States within the meaning of the section, and a preliminary examination before him is not a proceeding in any court which appointed him or in any court of the United States."

In the 16th Attorney General's Opinions, page 24, it was held that the defendants in a suit on a distiller's bond for the recovery of internal revenue taxes under sec. 3353, R. S. have no legal right to the use and control of the documents or other papers on file in the office of the Internal Revenue Department upon which the commissioner acted in making the inquiries and determination contemplated by section 318.

The COMMISSIONER: That goes to the other branch?

Mr. BURNETT: That goes to the other branch.

Now a single word your honor. There is no disposition on the part, I am quite sure, of any officer of the Government to do any injustice, to exercise any unfair advantage in the prosecution of any criminal or any person charged with a violation of the statute. But here is presented the broad general proposition, which your honor must consider in the orderly administration of justice. Supposing that it should be held that a conspiracy—persons charged with a conspiracy in these post office frauds, and that one party resided at Detroit, as I believe he did, and another at Toledo, and say, another resided in California, and that each one of these defendants should there demand a full hearing, and that the departments at Washington should take up their records and travel to these points all over the land and produce those records on preliminary hearings,—not on a trial—these gentlemen could block the wheels of administration. You cannot tell—no officer can tell—how essential the records may be in the administration of these great offices, nor what would become of these records in travelling about the country, or how essential they would finally become in the trial of the accused. Your honor can see what the inconvenience would, be to the administration of the Government in the executive functions. Aside from, all that, here is this consideration—coming back fundamentally; a great deal has been said about the Green & Gaynor case and sending it back by Judge Brown for re-hearing before Commissioner Shields. I differ somewhat with Judge Brown—I argued those cases before him—in some of his

determinations. I think the case was fundamentally right: On one broad ground, his decision is right, and perhaps technically, or perhaps a little broader than technically, he was right in sending the case back to Commissioner Shields. Commissioner Shields, under the agreement of the district attorney of Georgia who was here on the preliminary examination—Mr. Erwin, a very able lawyer—and the head of my criminal department, Mr. Baldwin, were satisfied that they had no right to go into evidence for the defense at all upon the hearing; where there was identification and the introduction of a certified copy of the indictment. Judge Brown thought—and I am not sure that he was right but am inclined to think that he was—that that was going too far, that he had no right to shut the defense off at that point, that they might go into evidence. The character of the evidence is another matter.

The COMMISSIONER: In a proper case.

Mr. BURNETT: In a proper case: That is the language he uses. Therefore Commissioner Shields had gone a little too far. It was not his fault; he followed what he believed to be the rule, that the indictment was conclusive, and about that the Supreme Court has never yet decided, never yet said exactly whether it might not be conclusive in the preliminary hearing, but it was sent back because he refused to hear any testimony.

Now, your honor, my judgment about that is this, in the preliminary hearing. I believe that the defendant, when the identification has been made, and a certified copy of the indictment has been produced, an indictment

that substantially states an offense against a law of the United States—it may be not quite technically, but if its allegations are of a substantial character—

The COMMISSIONER: I think I have covered that.

Mr. BURNETT: Yes: I am only stating my general ground. That when that is introduced, then what arises? That the defendant may then introduce evidence to what effect? He may introduce evidence that will challenge the indictment on two or three grounds. I don't know, but that was well illustrated by Judge Evans in a Kentucky case. In that case a party had-been indicted in Texas for a violation of the interstate commerce act, and they applied to Judge Evans in Kentucky for an order of removal. The magistrate committed the party. Then this judge took up the record of the whole proceeding and on the face of that record he said, This is an improper indictment. The court in Texas has no cognizance of this offense. The violation under the interstate commerce act was at the point of shipment and not at the point of delivery, and, therefore, that court was without jurisdiction and I refuse the order. Now, that same question might have been considered by the magistrate in meeting the indictment, that there was no jurisdiction by the court, that the statute of limitations had run. I believe they may go one step further, as some of the cases have held—and about that I am not quite sure, because I propose to be absolutely frank with the court and with our adversaries—perhaps one step further. They may produce proof to show that the party was not in this country at the time, that the offence could not have been committed by the accused—going to the

question, absolutely, fundamentally, of probable cause and alibi—perhaps that far, And yet I do not think the cases are quite clear about it, but I am inclined to think that that would be right. But beyond that, I do not believe, in these preliminary hearings, they can come. What would be the result? The result would be that a criminal might commit an offense in another district, in this district, if you please, and escape to California, and the defendant would demand that all the witnesses be transported from this city and from Washington to that preliminary hearing. That is only on the question of probable cause and try out the case on its merits—every criminal that should be arrested in the United States. Now, that is not reasonable construction of judicial procedure. That is not reasonable interpretation of what Congress meant in establishing its system of judicial procedure. It would be nullifying the criminal laws of the United States, and courts must give reasonable interpretation to these rules of procedure. We know, your honor knows, in that Green-Gaynor case, that when the door was opened the commissioner then did not know how far he was compelled to go and therefore when the case was returned him he opened the door wide, and we had a three months' investigation and hearing: witnesses brought from, all over the United States. Now, is that to be the case, and in all cases, that we are to go into a full hearing and trial on the mere arrest of a party to be taken to the place where he is indicted? It is not quite true, as my friend says, that a party is always entitled to a hearing. Take it in this State. If a man is indicted in Erie county and he is arrested here, and a warrant brought here, he is taken to Erie county. No hearing here. Your honor knows what the practice is. In any case, within the discretion of

the district attorney, there may not be any hearing at all, in a criminal charge, any preliminary hearing. He may go directly to the grand jury. It is not a constitutional right that a party shall have, under the United States system of procedure, a preliminary hearing.

The COMMISSIONER: Can't you take up the question of the subpoena and dispose of that rather than go into an extended discussion of this.

Mr. BURNETT: Well, it seemed to me—and for that reason—it appeared that the attorney for the defendant covered the ground and I tried to do the same. I have said all I have to say.

Mr. STEUER: May it please your honor, I think that the prosecuting counsel has confounded in his able efforts the right to issue the subpoena, and you will bear in mind that he read so as to illustrate that a letter to the Chief Executive of the country could not be produced under compulsory process, and you have been referred to the Aaron Burr trial, where it was attempted to compel President Jefferson to produce a letter, and the President did not produce the letter; and in that case Chief Justice Marshall went further than it was then deemed to be the law, and said that even the Chief Justice could not, if it were established that a document was pertinent to the issue, withhold that document. Now in this case, that document is proved to be extremely material.

Mr. BURNETT: Upon a full hearing before the court.

Mr. STEUER: That is the point. I say, we have already had the full hearing of the court, because they allege that the document is extremely material and pertinent. Now, we don't challenge their allegation and we don't dispute the fact, but relying upon their allegation, accepting it as true, we say produce the document or a copy. Now notice what Little says: "Deponent further says that the sources of his information are the official documents with reference to the making of the said contract and the said transactions, on file in the records of the United States of America and in the Post Office Department thereof, and letters, communications, from the Edward J. Brandt-Dent Company with reference to the said contract."

The COMMISSIONER: And what else?

Mr. STEUER: And the indictment. Now, those letters, those documents, that he says enabled him to see that there is probable cause for believing that Beavers is guilty of the offense set out in the indictment: those are the papers and the letters and the documents that we want here.

Mr. BURNETT: Now your application is for what purpose? For an order on motion to compel the witness' presence and show cause why he should not be punished for contempt?

Mr. STEUER: We don't want anybody punished, General. We want the use of documents to show the making of the contract. We are making proof of the service of process. You are arguing that we have not served process.

If the commissioner finds that we have served process that was binding noon the party served, then we apply for the proper remedy to see that the commissioner's order is fully carried out and obeyed. That is the proposition.

The COMMISSIONER: That is what I understand to be the only question before me at the present time.

Mr. STEUER: Now, Mr. Commissioner, with respect to the only question before you, and that is the only reason why I do not completely answer the proposition made by my adversary—I say with absolute confidence that every citation to which he has called attention, bears out the proposition that these subpoenas were properly issued and properly served. The question that arose in each of these cases was whether an indictment which charged a perjury committed in a court was a good indictment if on the face of the indictment it appeared that the perjury was committed before a commissioner.

The COMMISSIONER: I do not think we are at all at odds about this jurisdiction of the commissioner or his authority.

Mr. STEUER: Not at all. Now, that being so, we come back to the original proposition. From where is it that the commissioner derives his authority in this district? Why, the special enactment is that you are to follow the law practice and procedure of the State court, but by special statute in the State the commissioner, or rather the committing magistrate whose place you take here, is authorized to issue process, subpoenas, all over the

State. Now, how can there be any doubt? Are you going to draw any distinction between the various districts and the State? There is no such distinction at all. There is not any district limit upon your authority, because if there was any such limit it is for them to show it to you. We show you absolute authority to issue subpoenas all over the State, because every case says that your honor takes the place of the committing magistrate in the State in which the district is situated. Now, then, we show you that the committing magistrate's power by section 608 of the New York Code of Civil Procedure, is to issue subpoenas all over the State. Certainly it is not the position in the Green case where the subpoena was issued to be served—

The COMMISSIONER: I do not think that that is at all material. The witnesses appeared from all over the country without objection. The question is, in my mind; simply whether the subpoena issued by the commissioner in this district is good outside of the district, and I think it is not.

Mr. STEUER: What is it that causes you to come to the conclusion that your subpoena does not run outside of your district?

The COMMISSIONER: The General cited some authorities to that effect.

Mr. STEUER: He did not cite any.

The COMMISSIONER: I decided after investigation that that is the fact. Of course, in this case, if a subpoena

served within this district is refused to be obeyed the commissioner has no authority to punish the witness or to enforce the presence of the witness, but that question is presented by the commissioner to the court for its order. As the General has stated, the functions of the commissioner are limited. They are determined by some of the decisions of the court and the commissioner refers matters of disobedience of his orders, to the court for such action, as the court may deem proper.

Mr. STEUER: But the point that I differ with your honor on is that that procedure is simply limited to this district. The district judge is not limited in issuing the subpoena to this district, and if the arm of the court is not co-extensive with the court, what is the use of having the arm?

The COMMISSIONER: I think you are wrong about that, Mr. Steuer. I do not believe that service of my subpoena is good in the eastern district, good outside of the southern district of New York.

Mr. STEUER: All that would be essential, then, for the purpose of nullifying the provisions of section 614 would be that the district attorney in this department should see to it that the witnesses are outside of the district.

You see I am limited to issuing the subpoena under the law; but I have been unable, and Messrs. Morgan & Seabury have made a most exhaustive examination of the law on the subject and they have been unable to find a case, and I submit that the district attorney has not cited

a case in which it was held, the subpoena was limited to the district in which it was issued.

The COMMISSIONER: I don't care to cite the American and English Encyclopedia as an absolute authority, but you will find the question discussed there and will find that as authority besides the authorities quoted by the district attorney.

Mr. STEUER: The district attorney cites cases, first, to show that a chief executive cannot be subpoenaed.

The COMMISSIONER: This we will not discuss here.

Mr. STEUER: Second, he cites cases in which it was held that the proceedings before a commissioner are not proceedings in a cart. He has cited no cases, and has called attention to no case, and I would like to challenge the production of any case in which there is even an utterance by way of dictum, by which the subpoena of the commissioner does not run outside the district. I ask you to name the volume in which it appears.

Mr. BURNETT: Your ears are not very sharp.

The COMMISSIONER: I think you can stand on that decision. You can take your exception.

Mr. BURNETT: Now what disposition does your honor make?

The COMMISSIONER: What is the situation in regard to this?

Mr. STEUER: The situation is that they were subpoenas issued by you returnable at the last hearing; that they were in court at the last hearing. You recall Mr. Little was present on the stand and gave testimony with respect to identity. We had started to cross-examine and the objection was raised that it was not proper. We intended to call him for our case. The hearing was adjourned in order that we may examine the question as to whether or not the indictment was bad for duplicity. And then the hearing was announced for this morning at 10 o'clock. We hold that those gentlemen are under subpoena and should appear here and testify. We desire to put them on the stand and examine them.

Are the facts as I stated them admitted, Mr. Wise?

Mr. WISE: They were subpoenaed to appear here on the last hearing, have not been subpoenaed since and are not here and under no obligation to be here. It was not directed by the commissioner, nor were instructions given that the witnesses should be back here, and they are not here. If they had been subpoenaed they would have been here. Mr. Oldfield is in the employ of the Government at Washington. He is not going for the sum of $1.50, or at the pleasure of anybody to come running up here from Washington.

Mr. STEUER: This is not pleasure, Mr. Wise. If the Government is to be permitted to spirit witnesses away in this fashion and then come here and say, We want to be very generous to the defense, the Government never intends to deprived the defendant of any opportunity—

Mr. WISE: I deny any such imputation and throw it back in your face.

Mr. STEUER: Where are these people! Never mind. Where are these people!

Mr. WISE: If you want these people here get them in a legal way.

Mr. STEUER: The highest duty of the district attorney is to protect a defendant in his rights.

Mr. WISE: Then let the defendant apply to us to be protected.

Mr. STEUER: The defendant is to be protected in the absence of such steps. If you haven't learned that yet you have learned it now.

The COMMISSIONER: The hearing was on the 16th. An adjournment was then had to the 18th. As far as Mr. Little is concerned he answered on the 15th. There was no notice directed to him that he should appear on the 18th. He was not subpoenaed for the 18th. I don't see that the court can compel his attendance in any way.

Mr. STEUER: It was in the court as part of this proceeding. Now where is he for cross-examination. it was on the distinct agreement that he was to be called as part of our case that he was allowed to depart.

Mr. WISE: The court sustained our objection to your making our witness become your witness.

Mr. STEUER: It was stated by General Burnett that he was to be called as part of our case.

Mr. BURNETT: You are very loose in statement.

Mr. STEUER: I am not loose in statement. We have the original subpoena, and these people, I say, were taken away so they should not be served—

The COMMISSIONER: I don't think that is a proper statement.

Mr. STEUER: We had a subpoena signed by Commissioner Hitchcock. Where are these people that we want? We will show you that we have made every effort to subpoena them, every possible effort, and made it immediately. We applied to you before your honor left this court and had you sign it and it was directed to Little and Oldfield. We will make proof of our efforts to serve the subpoenas and the actual circumstances as they occurred on the last hearing.

The COMMISSIONER: That is on the record, Mr. Steuer.

Mr. STEUER: As to their leaving, there is nothing on the record as to that.

The COMMISSIONER: I shall not entertain any evidence to change this record.

Mr. STEUER: I don't want to admit such evidence. I wish to show that both of these men left the court before

the close of the session, and then we applied to you for a subpoena, and have since made every effort for the purpose of serving that subpoena.

Mr. BURNETT: If that is the fact we don't need any evidence, if they left the court—

Mr. WISE: Mr. Little was not on the stand under any subpoena. He was on the stand for the Government.

Mr. STEUER: Will you submit that he was subpoenaed for the 15th, to start with?

Mr. WISE: Yes, both Little and Oldfield, if you say so, and they were in court.

Mr. STEUER: And that they both left before the close of the hearing?

Mr. WISE: That was on the 15th?

Mr. STEUER: On the 15th.

Mr. WISE: I don't know if he did or not.

The COMMISSIONER: I do not know if he left.

Mr. WISE: I would like to have it on the record that the commissioner was not requested to direct, nor did he direct, and with that on the record we will admit that they left before the hearing had closed.

Mr. STEUER: Then we applied to the commissioner for a subpoena which was actually granted against Little and Oldfield.

Mr. BURNETT: Have you got that subpoena here?

The COMMISSIONER: I do not believe any subpoena has been signed by me with the name of the witness inserted.

Mr. WISE: I will admit that the subpoena was signed by the commissioner with the names in blank.

Don't you want to put on the record that you made diligent effort to serve it?

Mr. STEUER: Yes.

Mr. WISE: Diligent effort has been made by a person above 18 years of age, and that he failed to serve it, and returned it.

Mr. STEUER: That is right; that will suit our purpose.

Mr. WISE: I suppose you will admit on the record also that Mr. Oldfield is not a resident of the State of New York?

Mr. STEUER: If you say that he is not.

Mr. BURNETT: He is a resident of the State of Maryland.

Mr. Steuer: We will call upon the district attorney to produce, pursuant to our notice, to produce served upon them, the documents, papers and requisitions and requests from local Postmasters throughout the United States for permission to test the machines known as the Brandt automatic cashiers, manufactured by the Edward J. Brandt-Dent Co., and filed in the Post Office Department between February 1, 1897, and December 1, 1900. And also the reports made by the local postmasters upon those machines, and which reports are on file with the postal department. And all letters, telegrams and other communications between the Edward J. Brandt-Dent Co. and the Post Office Department of the United States of America, as are with the department and under its control. And all contracts made between the Edward J. Brandt-Dent Co. and the Post Office Department of the United States of America, for the purchase of the Brandt-Dent automatic cashiers, and particularly for a certain contract for the purchase of 250 of the said machines, which is the contract alleged and referred to in the first count of the indictment.

Mr. Burnett: My response to that is that I have possession of no such papers.

Mr. Steuer: The service of the notice to produce is admitted.

Mr. Burnett: It is.

Mr. Steuer: Now we procured a subpoena for one Harry F. Burns who is a resident of this district, and also

for one George F. Miller who likewise is a resident of this district; but each of these persons has been outside of the jurisdiction between the dates when we procured the subpoenas. We procured one for the 15th and also one for this morning. Harry F. Burns is a teller of a bank and is on his vacation and nobody has been able to discover where he is.

Mr. BURNETT: What is your application?

Mr. STEUER: To have an adjournment to give us an opportunity to produce Burns and Miller, both of whom are material witnesses on behalf of the defendant.

Mr. BURNETT: Our answer to that, if your honor please, is that if they are outside of the district there is no reasonable probability of their securing their attendance by any subpoena from your honor; and, second, that to make an application for a subpoena for a witness, and to cause a delay on that account, there would have to be evidence here of the materiality of the witness to the issue before the commissioner.

Mr. STEUER: I think I can satisfy you that the nature of the evidence is very material, Mr. Commissioner, George F. Miller is the person who is mentioned in the indictment as the person who paid the money charged in the indictment to Mr. Beavers. Now, if we show by George F. Miller that no such payment was ever made by him, I take it that you do not want any more proof that that testimony would be very material. Now, with respect to the General's point that there is no probability of our being

able to reach them by subpoena, we can make proof of that if he desires it. They both are away and each is expected back on Monday next.

Mr. BURNETT: If your honor please, I shall request right here now—on the application for that adjournment that he as a reason for the adjournment desires the attendance of these witnesses—that he should show to the court on this hearing the materiality of the witnesses.

The COMMISSIONER: I think the witness material if he can prove that he did not pay the money.

Mr. STEUER: We propose to show by Burns that the testimony that was given—that there is no testimony such as is alleged in the indictment, as to the giving of a check drawn by Drakes to Beavers.

Mr. BURNETT: What do you mean no testimony; before the grand jury?

Mr. STEUER: That there was no check given as that which was alleged. I propose to show you the account of Drakes. He is in possession of that account and the facts controlling, and we propose to show that such testimony as he did give was wholly incompetent.

Mr. BURNETT: Given where?

Mr. STEUER: Before the grand jury.

The COMMISSIONER: The testimony, as I understand it, is merely to contradict the statements of fact contained in the indictment.

Mr. STEUER: They destroy the possibility of their existence as facts, because we propose not only to contradict them, but propose to show that they are the only persons who could give testimony on the subject. And even assuming Mr. Commissioner, that there was testimony for the purpose of contradicting the averments of the indictment, I think that the testimony ought to be received, because I think this is a case which would come within your suggestion that "within a proper case" testimony should be received, and our being permitted to make the record at an early date so that the defendant should have the proper protection if by chance the commissioner should err.

The COMMISSIONER: I should prefer to meet these questions of proof on the hearing as they are presented. Your purpose is very sweeping.

Mr. BURNETT: Goes into the very foundation of the thing: whether your honor will go into the trial on the merits of this case —of the guilt or innocence of the accused.

If there are any other witnesses, or anything else that would cause any delay on that day, I want it now brought before you.

The COMMISSIONER: I ask Mr. Steuer to be ready to proceed, with all his witnesses on Tuesday.

Mr. STEUER: If we, pending this examination, should come to the conclusion after examination of the authorities, Mr. Commissioner, that we have the right to apply to you for a subpoena for all the persons who did not answer the subpoenas that we served, we should like to have it understood that there is no way of going before the commissioner for the purpose of getting the process?

The COMMISSIONER: I believe you can apply either to the court or the commissioner such process.

Mr. STEUER: But in applying to you you have determined that it is nugatory.

The COMMISSIONER: I think I should be advised of the purpose of the application for a subpoena.

Mr. STEUER: All right.

The COMMISSIONER: I have no objection to your applying to Judge Holt for a subpoena in this case and to be used outside of this district.

Mr. BURNETT: Your honor, it seems to me that a very good course that has been followed is when counsel applies for a *subpoena duces tecum*, to set out the name of the person they desire to subpoena and the materiality of the evidence, what they propose to prove and the materiality

of the documents. I think that same course ought to take place here.

The COMMISSIONER: It has been the practice here for 25 years precisely, when a matter like this arose, for the commissioner to sign the subpoena in blank, and it is left to the discretion of the attorney to fill it out. The attorney does not always know who his witnesses are or may be.

Mr. BURNETT: Did you, Mr. Commissioner, understand we were to apply to Judge Adams for subpoenas for only Burns and Miller?

The COMMISSIONER: I understood you wanted to apply for subpoenas for people who did not respond to your subpoenas here this morning.

Mr. STEUER: That's it exactly.

Adjourned until Tuesday, September 22, 1903, at 10 o'clock a. m.

Appendix D

Exhibit 2—Subpeona

The President of the United States of America to Edmund H. Driggs, J. F. Oldfield, Frank E. Little, Miss Wrenn, Henry F. Burns, George F. Miller, Hon. William J. Youngs, Greeting:

We command you, that all and singular business and excuses being laid aside you and each of you be and appear in your proper persons, before Samuel M. Hitchcock, United States Commissioner for the southern district of New York, at his office, room 78, United States court house and post office building, in the borough of Manhattan, city of New York, in the said southern district of New York, on the 18th day of September, one thousand nine hundred and three at ten o'clock in the forenoon of the same day, to testify all and singular what you and each of you may know in a certain proceeding now pending undetermined before the Commissioner, wherein The United States of America is complainant, against George W. Beavers, defendant on the part of the defendant. And this you or either of you are not to omit under the penalty upon each and every of you of two hundred and fifty dollars.

Witness, Samuel M. Hitchcock, United States Commissioner at the city of New York, the 15th day of September, in the year of our Lord one thousand nine hundred and three.

SAM'L M. HITCHCOCK,
United States Commissioner.

[SEAL.]

Appendix D

MORGAN & SEABURY,
Def't's Attorney.

(Endorsed:) Original—The United States vs. G. W. Beavers, Commissioner's subpœna, Returnable Sept. 18, 1903.—Morgan & Seabury, def't's attorneys.

The President of the United States of America to Miss Wreun, c/o U. S. dist. att'y's office, Brooklyn, N. Y., Greeting:

We command you that all business and excuses being laid aside, you appear and attend before Hon. Samuel M. Hitchcock, United States Commissioner for the southern district of New York, at his office, room 78, United States court house and post office building in borough of Manhattan, city of New York, in said southern district of New York, on the 18th day of September, 1903 at ten o'clock in the forenoon to testify and give evidence in a certain action now pending undetermined before said Commissioner for the southern district of New York, between The United States of America, complainant, and George W. Beavers, defendant, on the part of the defendant, and that you bring with you and produce at the time and place aforesaid all minutes, exhibits, records, stenographic notes documents and other papers and memoranda of any kind whatsoever made, received and taken at the inquiry of the grand jury of the United States of America held in the eastern district of New York, at the borough of Brooklyn, New York, during the month of July, 1903, in the investigation leading to the indictment alleged to have been found against George W. Beavers at

said sitting of the grand jury aforesaid, in relation to the alleged Brandt-automatic cashiers, now in your custody, and all other deeds, evidences and writings, which you have in your custody or power concerning the premises. And for a failure to attend, you will be deemed guilty of a contempt of court and liable to pay all loss and damages sustained thereby to the party aggrieved, and forfeit two hundred and fifty dollars, in addition thereto.

Witness, Samuel M. Hitchcock, United States Commissioner at the borough of Manhattan, in the city of New York, the 15th day of September, 1903.

[SEAL.] SAM'L M. HITCHCOCK,
U. S. Commissioner, Southern District of New York.

MORGAN & SEABURY,
Def't's Att'ys.

Arguments of counsel

UNITED STATES
vs.
GEORGE W. BEAVERS.

NEW YORK, *September 22, 1903.*

Present: The Commissioner, Mr. Burnett and Mr. Wise, for the government, Mr. Seabury, for the defendant.

Mr. Seabury asks for an adjournment on the ground that it being a Jewish holiday, Mr. Steuer is not present;

also on the ground that he has an application to present to the court to punish the witnesses served in Brooklyn, for contempt for failure to answer the subpœnas.

It being agreed that counsel for the defense will submit before a judge, before the adjourned date, the questions he desires passed upon with reference to all the witnesses under subpœna, so that the entire case can be taken up on the adjourned day before the Commissioner, the Commissioner adjourns the hearing until Friday, September 25, 1903, at 10 o'clock a. m.

UNITED STATES
vs.
GEORGE W. BEAVERS.

NEW YORK, *September 25, 1903.*

Met pursuant to adjournment.

Present: The Commissioner, and counsel as at previous hearing.

The COMMISSIONER: Are you ready to proceed?

Mr. STEUER: On account of the motions now pending before Judge Lacombe, we think we should not be required to proceed.

The COMMISSIONER: I understand your suggestion is that you have made an application in regard to the Little matter before Judge Lacombe, and, as I understand it,

there is a motion to punish him for contempt, before Judge Lacombe, returnable on the 2nd.

Mr. STEUER: Yes, sir.

The COMMISSIONER: Now, at the last hearing it was stipulated that the motions in regard to the witnesses subpœnaed in the eastern district, whatever those motions might be, should be presented before to-day. Has that been done?

Mr. STEUER: Yes.

Mr. WISE: Has any order been served on Mr. Youngs and Miss Wrenn?

Mr. STEUER: The applications were made and Judge Lacombe endorsed the papers, saying, as there was sufficient time before the next date on which he would sit, he would prefer it be made on notice of motion instead of order to show cause, and here is his original endorsement. That was made yesterday. Those papers are out pursuant to that direction, for service.

Now, with respect to Mr. Little, Judge Lacombe thought an order to show cause was proper, and did make an order to show cause, and in that order directed that the district attorney disclose the whereabouts of Mr. Little at the present time.

Mr. WISE: The district attorney has told Mr. Seabury everything he knows about it.

Mr. STEUER: I am not authorized to speak for the court, but, as I understand it, the court is going to require the whereabouts of Mr. Little to be known so that he shall appear before the court and explain his absence.

The COMMISSIONER: Did you state to Judge Lacombe that the district attorney had agreed to appear specially and argue this motion before him?

Mr. STEUER: I did not. We are perfectly ready to have the district attorney appear, provided he will make service of these papers.

The COMMISSIONER: I understand the district attorney, irrespective of the service of papers, is prepared, and so stipulated that he would appear before Judge Lacombe on the argument of this motion.

Mr. STEUER: We have no objection to that if Judge Lacombe will hear the motion without service on Mr. Little.

The COMMISSIONER: Have you any other witnesses?

Mr. STEUER: Under subpœna, yes, sir.

The COMMISSIONER: Are they in court?

Mr. STEUER: I presume so, but we want to examine these witnesses in their order and develop our case naturally, and the first person we want to call is Mr. Little, and after him Miss Wrenn. Now, we may be mistaken

in our theory, but that we cannot determine until the evidence is brought before you. If we cannot introduce the evidence we hope to by Mr. Little and Miss Wrenn, we may be able to introduce some evidence, but we cannot judge of that until we have the opportunity to do that.

The COMMISSIONER: When is your motion in regard to the eastern district subpœnas set for?

Mr. STEUER: Second of October. Judge Lacombe would not receive anything until then. Our order to show cause is returnable the same day.

Mr. BURNETT: We have been ready at all times to inform the gentlemen of where we suppose Mr. Little's office is, which is in this city and in the Post Office building.

The COMMISSIONER: That is a matter to be disposed of before Judge Lacombe, of course.

Mr. BURNETT: It seems to me the time has arrived when this ought to be made in some sort of legal way and it ought to be presented in a legal way. You and I, when we studied law, found a very sensible remark by Lord Coke, "The law never doeth a vain thing." Supposing we postpone these hearings and prolong and put them over from time to time to get the evidence of Mr. Little, and it should all the time be the fact that if Mr. Little were on the stand he would not be able to testify at all, then our work goes for nothing, and we do a vain thing. The old mode of procedure in these cases where a postponement was applied for, was to compel the party to produce an

affidavit showing not only the materiality, but wherein the materiality consisted, of the witness. In other words, to set forth what he expected to prove by the witness Then the court would not be frittering away its time in delaying for a witness who could not testify to these things, if present.

It seems to me the time has come now when we should require these gentlemen to state what they expect to prove by this witness.

The COMMISSIONER: There is a distinction there between a witness who has not been served and one they claim to have served. The contention here on the part of the defense is that they claim to have served Mr. Little and that he is in contempt of court. Now, under these conditions I do not think the question of the materiality of his evidence is so important as it would be if they were asking for delay because they had been unable to serve him. There, I think, they would, of course, be called upon to show that the witness was material, and give good reason why they had not produced him in court. Now, they have shown a case and have actually a motion on before Judge Lacombe, and an order to show cause why this witness should not be punished for contempt. I think that is a good reason for adjournment and I think that I should allow the defense some discretion in the manner in which they propose to present their case, and as they claim this does depend upon what they can obtain in the way of testimony from this witness and those from the eastern district who have been subpœnaed, I shall give them an adjournment. Peculiar circumstances have arisen here and with these motions pending I feel that they should have a reasonable adjournment. How much time do you desire?

Mr. STEUER: Two days after the day for argument, or, say, the next day. Judge Lacombe is going to sit on the 2nd, and if he does not decide on the 2nd, we will come in and inform you of that fact.

Counsel for the defense asks for a direction that the witnesses Miller, Burns and Driggs, be directed to appear upon the adjourned day without further subpœna.

Mr. Driggs not being in court, counsel for the defense stated that they will raise no question about his not being in court to-day.

The COMMISSIONER directs the witnesses, Miller and Burns to be present on the 5th of October, at the same hour, and the examination is adjourned to Monday, October 5, 1903, at 10 o'clock a. m.

UNITED STATES
vs.
GEORGE W. BEAVERS. } (No. 1.)

NEW YORK, *October 5th, 1903*.

Met pursuant to adjournment.

Present: The Commissioner. Mr. Henry A. Wise, ass't U. S. attorney, for the Government. Mr. William M. Seabury, for the defendant.

An order of Judge Holt having been served upon the Commissioner, staying all proceedings herein until an

order to show cause why Frank E. Little should not be punished for contempt has been disposed of, the hearing is hereby adjourned to Thursday, October 15, 1903, at 10:30 a. m.

Exhibit 1—Subpeona

Ex. 1, Oct. 15 / 03. G. R. C.

The President of the United States of America to William J. Youngs, Amy Wren or Wrenn, name "Amy" being fictitious, real given name unknown, Greeting:

We command you, that all and singular business and excuses being laid aside, you and such of you be and appear in your proper persons, before Hon. Samuel M. Hitchcock, a Commissioner appointed by the district court of the United States of America, for the southern district of New York in the second circuit, at his office at the U. S. court and post office building in the city of New York, in the said southern district of New York, on the 15th day of October, one thousand nine hundred and three, at 10:30 o'clock in the forenoon of the same day, to testify all and singular what you and each of you may know in a certain proceeding now depending undetermined before said Commissioner of the United States, for the southern district of New York wherein The United States of America is complainant and George W. Beavers is defendant, on the part of the defendant. And this you or either of you are not to omit, under the penalty upon each and every of you, of two hundred and fifty dollars.

Witness, Hon. Geo. B. Adams and Geo. C. Holt, judges of the district court of the United States, at the city of New York, the 7th day of October, in the year of our Lord one thousand nine hundred and three.

[SEAL.] THOS. ALEXANDER, *Clerk*.

(Endorsed:) The within subpœna was served on the within named Wm. J. Youngs and Amy Wren on the 13th day of October, 1903, at their office, P. O. building, Brooklyn, N. Y. by showing to each of them this original and leaving with each of them a copy thereof. Charles J. Haubert, U. S. marshal, E. D. N. Y.—Dated Oct. 15th, 1903.—Original subpœna for 15th October 1903.

Exhibit 2—Subpeona

Ex. 2, Oct. 15 / 03 G. R. C.

The President of the United States of America to Hon. William J. Youngs, United States district attorney for eastern dist. of N. Y., Brooklyn, N. Y., Greeting:

We command you, that all business and excuses being laid aside, you appear and attend before Hon. Samuel M. Hitchcock, United States Commissioner for the southern district of New York, at his office, room 78, in the United States court and post office building, in the borough of Manhattau, in the city of New York, on the fifteenth day of October, 1903, at 10:30 o'clock in the forenoon, to testify and give evidence in a certain proceeding now pending undetermined before said Commissioner, between The

United States of America, complainant, and George W. Beavers, defendant, on the part of the defendant and that you bring with you and produce at the time and place aforesaid, any and all documents, papers, requisitions and requests froin local postmasters throughout the country for permission to test the machines known as Brandt automatic cashiers and manufactured by the Edward J. Brandt-Dent Company and filed in the Post Office Department between February 1st, 1897, and December 1st, 1900, together with any and all reports made by said local postmasters upon said machines and submitted to the said department between the dates above referred to and subsequent thereto. Also all correspondence, letters, telegrams and other evidences of communications between the said The Edward J. Brandt-Dent Company and the Post Office Department of the United States of America which may be now under your control, also any and all the original contracts or documents relating thereto alleged to have been made by the Government of the U. S. or the Post Office Department thereof with the said The Edward J. Brandt-Dent Company for the purchase from said company of 250 or any other number of their so-called automatic cashiers, now in your custody, and all other deeds, evidences and writings which you have in your custody, or power concerning the premises. And for a failure to attend, you will be deemed guilty of contempt of court, and liable to pay all losses and damages sustained thereby to the party aggrieved and forfeit two hundred and fifty dollars in addition thereto.

Witness, the Honorable George B. Adams, and the Hon. Geo. C. Holt, judges of the district court of the

United States for the southern district of New York, the 7th day of October, in the year of our Lord one thousand nine hundred and three.

[SEAL.] THOS. ALEXANDER, *Clerk.*

MORGAN & SEABURY,
Def't's Attorneys.

(Endorsed:) United States district court.—United States of America vs. George W. Beavers.—Original—*Subpœna duces tecum* for Oct. 15.—The within *subpœna duces tecum* was served on the within named Wm. J. Youngs on the 13th day of Oct. 1903, at his office, P. O. building, Brooklyn, N. Y. by showing him the original and leaving with him a copy thereof. Charles J. Haubert, U. S. marshal, E. D. N. Y.—Dated Oct. 15th, 1903.

Exhibit 3—Subpeona

Ex. 3, Oct. 15 / 03. G. R. C.

The President of the United States of America to Miss "Amy" Wren or Wrenn (real Christian name of witness unknown), c/o United States district att'y for eastern district of New York, Brooklyn, Greeting:

We command you, that all business and excuses being laid aside, you appear and attend before Hon. Samuel M. Hitchcock, United States Commissioner for the southern district of New York, at his office, room 78, in the United States court and post office building in the city of New

York, on the fifteenth day of October, 1903, at 10.30 o'clock in the forenoon, to testify and give evidence in a certain proceeding now pending undetermined before said Commissioner, between The United States of America, complainant, and George W. Beavers, defendant, on the part of the defendant, and that you bring with you and produce at the time and place aforesaid, all minutes, exhibits, records, stenographic notes, documents and other papers and memoranda of any kind whatsoever made, received and taken at the inquiry of the grand jury of the United States of America held in the eastern district of New York, at borough of Brooklyn, New York, during the month of July, 1903, in the investigation leading to the indictment alleged to have been found against George W. Beavers at said sitting of the grand jury in relation to the alleged Brandt automatic cashiers, now in your custody, and all other deeds, evidences and writings which you have in your custody or power concerning the premises. And for a failure to attend, you will be deemed guilty of contempt of court, and liable to pay all losses and damages sustained thereby to the party aggrieved, and forfeit two hundred and fifty dollars in addition thereto.

Witness, the Honorable George B. Adams, and the Hon. Geo. C. Holt, judges of the district court of the United States for the southern district of New York, the 7th day of October, in the year of our Lord one thousand nine hundred and three.

[SEAL.] THOS. ALEXANDER, *Clerk.*

MORGAN & SEABURY,
Def't's Attorneys.

Appendix D

(Endorsed:) United States district court.—United States of America vs. George W. Beavers. Original—*Subpœna duces tecum* for Oct. 15.—Morgan & Seabury, No. 290 Broadway, Manhattan, N. Y. city, att'ys for defendant.—The within subpœna was served on the within named Miss Amy Wren on the 13th day of Oct. 1903, at her office P. O. building, Brooklyn, N. Y. by showing her this original and leaving with her a copy thereof. Charles J. Haubert, U. S. marshal, E. D. of N. Y. Dated Oct. 15th, 1903.

Arguments of counsel

UNITED STATES
vs.
GEORGE W. BEAVERS. } No. 1.

NEW YORK, *October 15, 1903.*

Present: The Commissioner, Mr. Wise, Mr. Steuer.

Mr. STEUER: I offer in evidence the original subpœna issued by the clerk of the district court of the United States for the southern district of New York, under the seal of the court, directing the appearance of William J. Youngs and Amy Wren before the Hon. Samuel M. Hitchcock the Commissioner appointed by the district court of the United States of America for the southern district of New York, in the second circuit, on the 15th day of October, 1903, at 10:30 o'clock in the forenoon, in this proceeding, being entitled "The United States of America, complainant, *vs.* George W. Beavers, defendant.

Appendix D

Marked Exhibit 1, G. R. C., of this date.

Mr. STEUER: I offer in evidence the proof of service made by Charles J. Haubert, U. S. marshal in the eastern district of New York, and endorsed upon the original supœna.

Part of Exhibit 1, G. R. C., of this date.

Mr. STEUER: I offer in evidence the original *subpœna duces tecum* issued by the clerk of the United States district court for the southern district of New York, under the seal of the court, on the 7th day of October, 1903, directed to William J. Youngs for his appearance before the Hon. Samuel M. Hitchcock, United States Commissioner for the southern district of New York, on the 15th day of October, 1903, at 10:30 o'clock in the forenoon, to testify, give evidence in this proceeding, The United States of America, complainant, *vs.* George W. Beavers, defendant, and produce the documents and papers mentioned and set out in that subpœna; and also proof of service, endorsed upon the original subpœna by Charles J. Haubert, U. S. marshal for the eastern district of New York.

Marked Exhibit 2, G. R. C., of this date.

Mr. STEUER: I offer in evidence an original *subpœna duces tecum*, issued by the clerk of the United States district court for the southern district of New York, on the 7th day of October, 1903, under the seal of this court, directed to Miss Amy Wren, directing her appearance and the production of the documents mentioned in the subpœna, on the 15th day of October, 1903, at 10:30 o'clock

in the forenoon before the Hon. Samuel M. Hitchcock, U. S. Commissioner for the southern district of New York; and the proof of service endorsed thereon by Charles J. Haubert, U. S. marshal for the eastern district of New York.

Marked Exhibit 3, G. R. C., of this date.

Mr. STEUER: The defendant calls Miss Amy Wren to testify in behalf of the defendant.

The COMMISSIONER: Is Miss Wren here?

Mr. WISE: No. Counsel objects, and asks on the record whether when those subpœnas were issued they were filled out as they appear, or whether they were in blank.

Mr. STEUER: Those subpœnas were served as they now appear; before service was made they were as they now appear; everybody presumes that the clerk of the United States district court for the southern district of New York performs his duty properly, and we stand ready to have the United States district court clerk of this district make proof to that effect, if counsel desires. Any information with respect to the appearance of these subpœnas he can get from the clerk of the court. They are issued under his original signature and under the seal of the court.

Mr. WISE: I deny on the record that these subpœnas, as they are now, were issued.

The COMMISSIONER: The subpœnas are received in evidence without objection.

Mr. STEUER: Now we call William J. Youngs.

The COMMISSIONER: Is William J. Youngs in court?

Mr. WISE: He is not.

Mr. STEUER: We ask that this record be certified to the United States district court in support of an application to punish each of these witnesses for contempt of court.

Mr. WISE: I object to this proceeding for the reason that I do not think the United States district court has anything to do with this proceeding whatever. This is an independent tribunal, and that it is either for the Commissioner to punish or not to punish. I do not think the United States district court, or any other court, has anything to do with any contempt of this court.

The COMMISSIONER: I shall certify that record to the district court.

Mr. CHATFIELD: I have no standing, of course, to appear in any way, but at this stage of the proceeding I should like to express to you, as United States Commissioner, a disavowal of any intention to disregard—because of any lack of respect—anything done by you, or done by the court, and to say on behalf of these witnesses who have been called, that they are not here, simply to raise the question of jurisdiction, and not at all because

of any desire, directly or indirectly, to show disrespect. It was stated in open court by the attorneys for the defendant that they do not desire the punishment of the witnesses but, rather, their attendance, and so it seems to me fitting that we should say that we are not staying away to prevent attending, but simply because we do not think the process is sufficient, and to raise the question whether they should attend: not to put themselves in a position of seeking to be punished for contempt. I have a personal letter from the district attorney to the U. S. Commissioner (handing letter to the Commissioner) stating what I have stated to you, simply as an earnest of his position, standing on the legal ground rather than on any personal ground that might be considered lack of respect. I don't want to say anything about this process; don't want to criticise the action of the defendants. I have no standing here in the court. We might some time have something to say about their action as well as what they say about ours.

The COMMISSIONER: The question of the subpœnas has been taken to the court on a subpœna issued by me as Commissioner, and has been argued.

Mr. CHATFIELD: That is, new subpœnas either make that a useless question, or simply raise an academical question which, I suppose, will be straightened out between the counsel for the parties.

The COMMISSIONER: When I first became connected with the United States court it was the practice to have subpœnas issued out of the United States district court to the attorney before the United States Commissioner.

For some reason that practice was abandoned and it has now been the practice for a number of years for the Commissioners to issue subpœnas themselves. If for no other reason than to have the practice established by the court, I should certify this question, irrespective of the question of contempt involved.

Mr. CHATFIELD: Then you mean the court's ruling does not involve a decision—that is, on your part, of whether you can punish for contempt. Simply that this is, in your judgment, a question for the court to decide.

The COMMISSIONER: It is.

Mr. WISE: I think that ought to be on the record.

Mr. STEUER: I think this is an absolutely wilful, deliberate, flagrant contempt, and it does not matter who has seen fit to advise this contempt. Either the United States Commissioner is a nullity in this proceeding, or else the gentlemen in the eastern district have simply refused to recognize the United States district court in this district. If these subpœnas are legal, these men ought to be severely punished and the girl ought to be severely punished. If the subpœnas are illegal they have proved their discourtesy and we will simply be proved to be unable to punish for contempt.

They have had every opportunity to appear that a gentleman and a lady would desire. They have seen fit to refuse to appear and they will have to abide by that as the court determines, with respect to their advisers as well as themselves.

Mr. CHATFIELD: Of course, as far as courtesy is concerned, Miss Wren would come in a moment, if we were not advised to stand in the same position. The fees which have been paid her have been received under protest, and she would be very glad to attend. I don't want any misunderstanding.

The COMMISSIONER: I think it should be presented to the United States district court, the subpœna of that court. The witnesses have been served.

Testimony of George F. Daggett

GEORGE F. DAGGETT, being duly sworn, testified as follows:

(By Mr. STEUER:)

Q. Are you in the employ of the United States Government?

A. Yes, sir.

Q. In what capacity?

A. The chief clerk to the inspector in charge of the New York division of post office inspectors.

Q. Are you acquainted with Mr. Frank E. Little?

A. Yes, sir.

Q. Is he one of the United States inspectors?

A. Yes, sir, he is a United States post office inspector.

Q. Where did you last see Frank E. Little?

A. Where did I last see him?

Q. Yes.

A. In our office.

Q. Where is your office?

A. Rooms 104, 106 and 109 on the fourth floor of this building.

Q. And when did you last see him, do you recall?

A. I don't now recall the date.

Q. Approximately?

A. Well, possibly three weeks ago.

Q. Have you any record of his present whereabouts?

A. I have not, no, sir.

Q. Nothing from which you could ascertain as to his present whereabouts?

A. Nothing.

Q. Is there any record kept in your office by any person, other than yourself, from which the whereabouts of the different post office inspectors can be ascertained?

A. The inspectors operating under the direction of our office are always kept track of by daily reports, and whenever they are answerable to our office in their work we always know where they are.

Q. Is Mr. Frank E. Little at the present time answerable to your office?

A. No, sir.

Q. When was he last answerable to your office?

A. Well, to my knowledge, not within six months.

Q. And during the last six months then you have no record from which his whereabouts could be traced?

A. No, sir.

Q. Now, would you make the same answers, Mr. Daggett, with respect to Inspector J. F. Oldfield?

A. Yes, sir, except that Mr. Oldfield has never been connected with our office and has never been answerable in daily reports, or otherwise, to our office.

Q. He was at your office more recently than Inspector Little was, was he not?

A. I think not.

Q. Or about the same time did you see them last?

A. They were there about the same time and I think that neither inspector has been in our office since the time, possibly four weeks, ago, but I am not, perhaps, within a week of the exact time, because I have kept no record of it, and not even tried to remember the date.

Q. Do you know who has control of Mr. Little now; that is, to which department he is answerable now for his whereabouts?

A. Well, only as my information comes through the public information and channels that everybody has—that he is operating under the immediate direction of the department at Washington. Of course, under the proper official conducting investigations from the department.

Q. Do you know who those officials are or who the official is?

A. I have no connection whatever with those officials in the investigations that we allude to here, and only know that, as matter of information public, which everybody else knows, I am acquainted; not otherwise, there being absolutely nothing through our office connected with him.

Q. Well, which is the official that you know him to be answerable to?

A. I don't know that he is answerable—I don't know the particular official he is answerable to.

Q. And you make the same answers with respect to Inspector Oldfield?

A. Exactly, yes.

WILLIAM KLEIN recalled.

Testimony of William Klein (recalled)

(By Mr. STEUER:)

Q. Mr. Klein, you recall the last appearance of Mr. Little in this proceeding, do you not?

A. Yes, sir.

Q. Since the time that Mr. Little was a witness and swore in this proceeding and left the court room, have you made efforts to find him in this city?

A. I have.

Q. And have you been able to find him?

A. I have not.

Q. Have you gone to the inspector's room in this building to secure him?

A. I have gone there very frequently.

Q. Have you at each time had with you a copy of Judge Holt's order to show cause?

A. I did.

Q. Have you been able to serve that upon him at all?

A. I was unable.

Q. Have you been able to serve any subpœna on him?

A. No, sir.

Q. Now, you know Inspector Oldfield?

A. I do.

Q. You remember his appearance in court on the day that Mr. Little was sworn?

A. Yes, sir.

Q. At that time did you see Inspector Oldfield?

A. I did.

Q. Where did you see him?

A. In the inspector's office.

Q. At that time did you have a subpœna with you?

A. Yes, sir.

Q. Did you make any effort to serve Inspector Oldfield with that subpœna?

A. I did, that morning.

Q. Just please state what occurred.

A. Well, it was on the 22nd of September I came into the office and I saw two gentlemen standing—it was in room 104.

Q. In this building?

A. In this building. I saw two gentlemen standing at the window and I walked up to them. I believe it was Inspector Meyers, and the other, I ascertained, was Inspector Oldfield. I asked them if Mr. Little or Mr. Oldfield were in. They said no; and at the same time this gentleman, who was Mr. Oldfield, moved away from me, trying at the same time to hide his features. And then he went into the inner room of the inspector's office—that is, between the main office and this inspector's room—and closed the door. When he closed the door I saw that this was Inspector Oldfield; I saw his features and recognized him. When he closed the door he put his face against the glass and I could distinctly see his features, because I could see it by the moustache—the peculiar colored moustache—which I could not see before because he was

in the light and I had just come in from the dark hallway and therefore I could not recognize him at a glance. I then waited there and informed the people in the office that I knew this was Inspector Oldfield, they at the same time not admitting that it was him. So I stayed around there and one time I went back in the office—probably about a minute afterward—and saw that he just opened the door and was looking out and just as I was going to walk toward him he closed the door.

Q. Could you get to him?

A. I don't know if the door was locked. I was told it was locked. I did not attempt to open it; I did not care to intrude upon the office of the inspectors.

Q. Since that time have you been able to serve him with a subpœna at all?

A. No, sir.

Q. After that time did you have a subpœna, issued in this proceeding?

A. Yes, sir.

Q. To Inspector Oldfield?

A. To Inspector Oldfield.

(By Mr. WISE:)

Q. Where is that subpœna?

A. You mean the subpœna that I was to serve upon Mr. Oldfield that morning? The one I had with me to serve?

Q. I don't know whether it is the one or not.

A. There is the original and I haven't the copy with me (producing).

Q. Mr. WISE: I ask that that be marked in evidence.

Marked Exhibit 4, G. R. C., of this date.

Q. How do you know that this man that you say was Oldfield, was Oldfield?

A. Because I recognized him.

Q. How did you recognize him?

A. I had previously served him and was introduced to him by Mr. Frank E. Little, the post office inspector.

Q. And because you were introduced to him you are willing to swear he was Oldfield?

A. I have heard him addressed as such.

Q. And on that you say you know that was Oldfield?

A. Yes, sir.

(By Mr. STEUER:)

Q. He had accepted that subpœna as Inspector Oldfield?

A. Yes, sir, on the previous day.

Q. Did he attend the examination pursuant to that?

A. Yes, sir; and after that time I had him pointed out to me as Inspector Oldfield.

Q. Hadn't any doubt it was the same person you saw?

A. None at all.

(By Mr. WISE:)

Q. You are equally positive you served a man called Whalen, Post Office Inspector Whalen, were you not?

A. No, I served Post Office Inspector Weyland, who was the man I wanted. It was merely a misdescription of the name. Knew the man I wanted.

Q. You will swear you served a man named W-h-a-l-e-n?

A. Yes; that morning on the 11th of December.

Q. And you gave him $2.00?

A. $2.00.

Q. You are equally positive that was Weyland?

A. No, sir; there is no such inspector to my knowledge.

Q. You served a subpœna on a man—addressed to a man named Whalen?

A. This gentleman I meant—it was meant for a man, Confucius Weyland.

(By Mr. STEUER:)

Q. You served the right man and his name was misspelled?

A. Misspelled.

Q. And then he returned the subpœna to Seabury & Morgan?

A. Signed C. S. Weyland.

Q. In other words, you had served the right man but the misspelling was in the subpœna and he took advantage of that and did not attend?

A. It seemed so.

Q. And returned the subpœna?

A. Yes.

Q. And subsequently you served a subpœna in which the name was properly spelled?

A. Yes.

Q. And he has appeared?

A. He has appeared.

Testimony of Edmund H. Driggs

EDMUND H. DRIGGS, being duly sworn, testified as follows:

Mr. WISE: Before he is examined I wish to instruct him as to his privilege. He is under an indictment for the same offense in the eastern district of New York.

Mr. STEUER: I think that is proper, Commissioner.

The COMMISSIONER: I instruct you then, Mr. Driggs, that you may refuse to answer any question which will tend to incriminate you.

(By Mr. STEUER:)

Q. Were you called or subpœnaed to attend a session before the Federal grand jury in the eastern district of New York in the month of July, 1903?

A. Yes, sir.

Q. Were questions put to you before that body at that time?

Mr. WISE: I object to that. This is an attempt to disclose the proceedings before the grand jury and not in this jurisdiction. As I understand it, the only way that the minutes of the grand jury can be gotten at is to appear in that jurisdiction and move the court in a regular and orderly way for the right to examine those minutes; and the minutes are the best evidence of what took place before that grand jury, and this witness should not be permitted to show any such thing as is sought to be shown by his testimony here.

Mr. STEUER: The minutes are not the best evidence at all of what took place before the grand jury. The witnesses who appeared before the grand jury are the people best qualified to say what transpired. We hold that we have an absolute right in a proper proceeding to expose what took place before the grand jury. We don't do it at all in order to make a disclosure of what transpired before a secret body. We do propose to show what transpired before that grand jury so as to show that there was not any evidence upon which that body could have found an indictment, a legal, valid, lawful indictment against George W. Beavers. We have no other purpose in calling this witness or any other witness who appeared before the grand jury. For that we have the authority of this court in well considered cases.

Mr. WISE: In reply to that I have to say that it has been decided by the United States Supreme Court that

in such a proceeding as this, where an indictment is produced, the presumption is that the indictment has been found in a regular and orderly manner, and I can cite a case that of Green v. Henkel in 183 U. S. Reports.

Mr. Wise's objection sustained by the Commissioner. Mr. Steuer takes an exception.

Mr. STEUER: So that there may be no mistake about it: What I proposed to show was that the testimony given by the witness was illegal, incompetent and irrelevant, and improperly received; and that it in no way gave a foundation for the finding by the grand jury of any fact attempted to be set out in that indictment, and I understand that you refuse to permit me to show by this witness.

Mr. WISE's objection sustained. Mr. Steuer excepts.

The WITNESS: I would like to ask if I am excused?

The COMMISSIONER: Yes.

The WITNESS: Is this for the rest of this hearing?

Mr. STEUER: We have no further subpœna to serve. Will it be necessary to go through the formality of swearing the witnesses?

Mr. WISE: I think it will.

Mr. STEUER: We want to note a demand by the defendant. The prosecution should examine Mr. Driggs.

Mr. Wise: Well, the prosecution declines. The prosecution has presented its case and rested. The Commissioner has held that it is a prima facie case and we don't propose to present any further evidence.

Tesitmony of George F. Miller

George F. Miller, being duly sworn, testified as follows:

(By Mr. Steuer:)

Q. Mr. Miller, were you subpœnaed to attend before the Federal grand jury in the eastern district of New York during the month of July, 1903?

A. I was not.

Q. Did you attend before that body?

A. No, sir.

The witness is informed by the Commissioner that he is excused until he is under subpœna again.

Tesitmony of Harry F. Burns

Harry F. Burns, being duly sworn, testified as follows:

(By Mr. Steuer:)

Q. Where do you reside, Mr. Burns?

A. Brooklyn.

Q. What part of Brooklyn, what street number?

A. McDonald.

Q. How are you now employed?

A. Secretary of the Nassau Trust Co.

Q. How were you employed during July, 1903?

A. Same position.

Q. Over what period of time does your employment with that trust company extend?

A. Between 14 and 15 years.

Q. Were you subpœnaed to attend before the Federal grand jury held in the eastern district of New York during the month of July, 1903?

A. I was subpœnaed to appear there; I can't say whether it was in July or not; I did not pay any attention to the date.

Q. Have you got the subpœna ticket was served on you?

A. I have not.

Q. Was it in connection with the case of United States vs. George W. Beavers?

A. It was.

Q. Were questions put to you before that body?

Mr. WISE: I make the same objection that I made when Mr. Driggs was examined; on all the grounds then stated.

Mr. STEUER: And we propose to show by this witness that he gave no testimony upon which, either separately or taken in conjunction with all the other testimony before that body, a legal, lawful, or valid indictment could be found against George W. Beavers; and we also propose to show that such testimony as was given by him before that body was illegal, incompetent, irrelevant and immaterial to the issue then before that body.

Mr. WISE's objection is sustained.

Mr. STEUER takes an exception.

Mr. STEUER: And, as I understand, that ruling would apply to any questions propounded on that point?

The COMMISSIONER: The same ruling would apply.

Do you desire me to certify this record as far as it refers to Mr. Youngs and Miss Wren?

Mr. STEUER: We will content ourselves with that.

The COMMISSIONER: Now, do you desire an adjournment until after such time as you make that application to the court? When will you make your application to the court?

Mr. STEUER: At once.

Mr. WISE: Before we stop, may I ask if the defense have any other witnesses they propose to call.

Mr. STEUER: We will not call any witnesses if the determination is against us on the application with respect to Miss Wren and Mr. Youngs. If the determination is in our favor we will call other witnesses.

Examination adjourned until Friday, October 23, 1903, at 10 o'clock a. m.

Arguments of counsel

UNITED STATES
vs.
GEORGE W. BEAVERS. } No. 1.

NEW YORK, *October 23, 1903.*

Hearing adjourned to October 28, 1903, at 10:30 a. m.

Appendix D

UNITED STATES
vs.
GEORGE W. BEAVERS. } No. 1.

NEW YORK, *October 28, 1903*.

Met pursuant to adjournment.

Present: The Commissioner, Mr. Henry A. Wise, ass't U. S. attorney, for the Government. Messrs. Morgan & Seabury, for the defendant.

Mr. SEABURY: I request the Commissioner to grant an adjournment of a few days in order to enable us to secure the attendance of two witnesses, Col. Young and Miss Wren, and I state that yesterday we submitted to the Commissioner, for signature, two subpœnas, one running individually to Col. Young and Miss Wren, requiring their attendance before him this morning, and another subpœna requiring the attendance of the same witnesses, together with certain books and documents therein named.

Am I correct in the statement that you decline to sign those *subpœnas duces tecum*? It was reported to me that the Commissioner declined to sign the *subpœna duces tecum*, but he did sign the individual subpœna; and I now renew my request to the Commissioner to sign the *subpœna duces tecum*, as well as a new individual subpœna, returnable at any day he may name.

The COMMISSIONER: I was requested yesterday by the defendant to issue *subpœnas duces tecum* directed to

William J. Youngs, United States attorney for the eastern district of New York, and Amy Wren, stenographer in his office, requiring them to produce certain books, documents and records, and the minutes taken at the inquiry of the United States grand jury, by which the indictment against this defendant was found. I declined to issue these subpœnas, upon the ground that this application is equivalent, in my judgment, to an application to inspect the minutes taken before the grand jury, and, and, therefore, it is the rule in this district to deny that application

I shall mark the subpœnas presented to me, as Exhibits 1 and 2 of this date.

Mr. SEABURY: Defendant's counsel states that the important point, from the standpoint of the defendant, is to secure the attendance of the witnesses in question and the production of the documents named in the *subpœnas duces tecum*, and that he desires to have the record of this proceeding in such form that the defendant will be able to review on appeal his right to the process of this court for the attendance of the witnesses named, and the documents already mentioned.

The COMMISSIONER: I yesterday issued subpœnas for the attendance of William J. Youngs and Amy Wren, and the defendant may take such action as he is advised in regard to compelling the attendance of these witnesses.

In regard to the *subpœna duces tecum*, I have marked those subpœnas as Exhibits 1 and 2 of this date and they

will constitute a part of the record of this proceeding which may be reviewed if the defendant desires.

Mr. SEABURY: I do not think, Commissioner, that will secure the defendant in his rights here at all. I think we are entitled in the first place to the process of this court to secure the attendance of the witnesses. Whether they will be permitted to testify is, of course, an entirely different question. Whether the documents they produce are competent to be offered in evidence is an entirely different question. The only question before you now is our application to have you issue process to secure the attendance of these witnesses, and the documents mentioned.

The COMMISSIONER: I have issued subpœnas to secure the attendance of these witnesses, but, as I have stated, the *subpœna duces tecum* calls for the production of the minutes, the proceedings before the grand jury, and this application is equivalent, in my judgment, to an application to inspect the minutes of the grand jury, and such applications are uniformly denied in this district.

Mr. SEABURY: I desire to call your honor's attention to the fact that the State Code of Criminal Procedure authorizes a criminal magistrate to issue *subpœnas duces tecum* to witnesses, and I ask you to reconsider our motion to have you issue *subpœnas duces tecum*. And even if those documents are produced, the question cannot at all be analogous to a motion to inspect the minutes, because the question whether you will permit those documents to be inspected will be still before you when they are produced. I do not see how it is possible to pass on it beforehand.

The COMMISSIONER: I appreciate all you say, but whether the papers to which you ask my signature, appear on their face to call for the production of papers which would not be admissible—I think the question can be determined by me properly at the outset upon this application.

Mr. SEABURY: I also call your honor's attention to this fact, that all the documents are not of the character mentioned by you; that is to say, that some of the documents—the contract, for instance, which is alleged to have been procured by this defendant in an unlawful way—and it is most material that the defendant should be permitted to examine the very contract that he is alleged to have fraudulently procured. Certainly that is no part of the minutes of the grand jury and not entitled to any exemption from inspection.

The COMMISSIONER: I shall stand by my decision.

Mr. CHATFIELD: I think, Commissioner, it should go on the record that you are willing to renew the personal subpœna, because they did not have time to serve them this morning.

Mr. SEABURY: Well, the Commissioner has signified his willingness to issue personal subpœnas. Of course, I am entirely unprepared for this, Commissioner, and all I can do is to ask that you give me a day or two to determine what course should be adopted with reference to this. If it was in the State court the proper procedure would be to secure a mandamus and make the Commissioner issue

the subpœna. I think we should be afforded an opportunity to raise the matter in the proper way. I am not at all convinced; I am inclined to think we would not be properly secured in the present condition of the matter.

Mr. STEUER: Did I understand Mr. Chatfield to say the witnesses will be here?

Mr. CHATFIELD: I expect, unless circumstances change—something we do not know about now should turn up—we will have them here.

Mr. STEUER: When?

Mr. WISE: I object to that. Mr. Chatfield is not the attorney for the prosecution, or for the defendant, in this case, and he is not a witness.

Hearing in this case, No. 1, adjourned to Friday, October 30, 1903, at 10:30 a. m.

Hearing in the other cases adjourned to Friday, November 6, 1903, at 10:30 a. m.

Appendix D

United States
vs.
George W. Beavers. } No. 1

New York, *October* 30*th*, 1903.

Present: The commissioner. Mr. Henry L. Burnett, United States attorney, and Mr. Henry A. Wise, ass't U. S. attorney, for the Government.

Mr. Steuer and Mr. Seabury, for the defendant.

Mr. Steuer: Is it stipulated that the witnesses Col. Youngs and Miss Wren are here as if served with both subpoenas?

Mr. Burnett: We shall oppose and fight any *subpoena duces tecum* to produce the archives of the office of the district attorney. What the understanding may be to the effect that they are here the same as though some such subpoena had been served upon them, I am not prepared to say. They are here: go ahead with your examination.

Testimony of Amy Wren

Amy Wren, being duly sworn, testified as follows:

Examination by Mr. Steuer:

Q. Where do you reside, Miss Wren?

A. In the borough of Brooklyn, 400 Classon Ave.

Q. What is your occupation Miss Wren?

A. I am clerk to the United States attorney for the eastern district of New York.

Q. You are not an assistant district attorney, are you?

A. I am designated as clerk; I don't know as I am an assistant or not.

Q. Have you ever been sworn in as an assistant district attorney?

A. Well, I don't think that the oath reads—I know when I took office I made a copy of the oath of office that Mr. Pettit, who was then district attorney, took, and took that same oath and I do not think it says in the oath one way or the other what office you take. It simply is a general oath.

Q. Are you a member of the New York bar?

A. No, sir.

Q. Have you been admitted to practice in the United States courts?

A. No, sir.

Q. Not in any courts, do I understand?

A. No, sir.

Q. You have never received an appointment as an assistant United States attorney for the eastern district of New York, have you?

A. I was appointed as clerk.

Q. And that is the only capacity in which you know that you ever have been appointed in the employ of the United States Government?

A. Well, then I have taken a subsequent oath as stenographer to the grand jury.

Q. Now, in the month of July, 1903, were you in attendance at the Federal grand jury that was held in the eastern district of New York?

A. Yes, sir; as stenographer.

Mr. BURNETT: Wait a moment. Well, perhaps that is laying the foundation for the next question.

Q. And at that time was the matter of the United States *vs.* George W. Beavers—

Mr. BURNETT: Don't answer now.

Mr. STEUER: I do not think that that is proper procedure.

The COMMISSIONER: I will caution the witness not to make any disclosures of the inquiry by that body.

Mr. BURNETT: I object to it, if your honor please.

The COMMISSIONER: That objection is sustained.

Mr. STEUER: I suppose you want to hear me, Commissioner?

The COMMISSIONER: Not at all.

Mr. STEUER: We except.

Q. Did you make any notes of any proceedings that were had before the Federal grand jury during the mouth of July, 1903, held in the eastern district of New York?

Mr. BURNETT: I object, if your honor please. What took place before that grand jury is not a subject of inquiry here.

Mr. STEUER: I am asking whether she took notes. All that calls for is yes or no.

The COMMISSIONER: Objection sustained.

Mr. STEUER: I except.

Q. Can you state, of your own knowledge, who attended as witnesses before and upon the Federal grand jury that was in session during the month of July, 1903, in the eastern district of New York while the matter of The United States vs. George W. Beavers was under investigation?

Mr. BURNETT: I object, if your honor please.

The COMMISSIONER: Objection sustained. Exception taken.

Q. Were you in the room of, and in the presence of the Federal grand jury which was in session during the month of July, 1903, in the eastern district of New York?

Objected to. Objection sustained. Exception.

Q. Were you admitted to the presence of, and were you in the room of the Federal grand jury which was in session in the month of July, 1903, while the matter of United States *vs.* George W. Beavers was under investigation or inquiry?

Objected to. Objection sustained. Exception taken.

Q. Have you with you the notes or minutes or memorandum, or paper writing of any kind, that you either made at the time that the Federal grand jury was in session in July, 1903, in the eastern district of New York, with respect to the proceedings of inquiry that that body made in the matter of The United States *vs.* George W. Beavers, or in your possession?

Mr. BURNETT: I object, if your honor please. While this apparently is simply laying the foundation for another question and might be innocent in itself, I think the rule is never to lay the foundation to a competent question by asking an incompetent question. I therefore object at the outset.

Objection sustained. Exception taken.

Q. Will you be good enough to produce the minutes that you made of the proceedings of the Federal grand jury during the month of July, 1903, in the eastern district of New York, and particularly with respect to the proceedings in the matter of the inquiry of The United States *vs.* George W. Beavers?

Objected to. Objection sustained. Exception taken.

Q. Do you know of your own knowledge who were the witnesses that attended upon the Federal grand jury in the eastern district of New York, during the month of July, 1903, while the matter of The United States *vs.* George W. Beavers was under investigation or inquiry?

Objected to. Objection sustained. Exception.

Q. Have you any personal knowledge as to the whereabouts, at the present time, of the requisitions and requests from local postmasters throughout the United States for permission to test the machines known as the Brandt automatic cashiers, and manufactured by the Edward J. Brandt-Dent Co.?

A. I have no knowledge, no, sir.

Q. Did you ever have any knowledge as to the whereabouts of those papers?

A. I don't think I ever did: don't think I ever saw them at all.

Q. Were they produced during the month of July, 1903, while you were in the presence of the Federal grand jury held during that month in the eastern district of New York?

Objected to. Objection sustained. Exception taken.

Q. Were those papers produced and exhibited to you, and were they marked by you, during the month of July, 1903, while you were in the presence of and in attendance upon the Federal grand jury that was in session in the month of July, 1903, in the eastern district of New York?

Objected to. Objection sustained. Exception taken.

Q. Are you aware of the present whereabouts of any reports made by the local postmasters throughout the United States upon the Brandt automatic cashiers, manufactured by the Edward J. Brandt-Dent Co.?

A. Well, isn't that the same question?

Q. Are you aware of reports made by the postmasters?

A. I understand the question, do I know where those reports are?

Q. That is right?

A. No, I do not know.

Q. During the month of July, 1903, did you see such reports?

Mr. Burnett: While I object to that because that might involve the fact that she saw some such reports in the grand jury room and it would be indirectly getting incompetent and improper testimony, you might ask when and where. The question should involve time and place, that is, should be specific. If it involves what took place in the grand jury room, then she cannot answer.

Mr. Steuer: As against that, I want to state that the purpose of the inquiry made by the defendant is not to disclose what transpired in the grand jury room. The purpose of the inquiry—so that it may not be misunderstood—is to show that there was nothing before the Federal grand jury, that found this indictment, upon which a legal, valid indictment could be based. When that is the purpose, and not simply to expose the secrets of the grand jury, it is competent and admissible; that is the point.

Mr. Burnett: Now, it is equally objectionable to prove a negative of what did not take place before the grand jury as it is to prove the affirmative.

Objection sustained. Exception taken.

Mr. Steuer: Did you see during the month of July, 1903, those reports anywhere outside of the grand jury room?

Mr. Burnett: If your honor please, on the further ground: I contend that there is no power on the part of the defendant to go into the correspondence or investigations made by any executive officer acting under any authority of the President of the United States, or the executive department of the Government upon what information they acted, what papers are on file in those offices. Even the court cannot call that into question, except if in some way a paper may become legitimate testimony. Perhaps there may be some such paper, but the general investigation and correspondence upon which the Government acted in proceeding against criminals, or in carrying on a department, is outside of the power of the judiciary to compel the executive department of the Government to disclose. I want to raise that question here now.

Objection sustained. Exception taken.

Q. Did you during the month of July, 1903, see those reports or any of them in the grand jury room of the Federal grand jury in session during that month in the eastern district of New York?

Objected to. Objection sustained. Exception taken.

The Commissioner: You cannot go further with this line of examination, Mr. Steuer. I think you have shown or asked whether Miss Wren was present in the grand jury room, and now you ask a question which, of course, the other question precludes; the one question precludes the other.

Mr. STEUER: Miss Wren has testified that she was before the grand jury in the capacity of a stenographer.

Second question and answer on p. 148 of this record read by the stenographer.

Objected to. Objection sustained. Exception.

Q. Did you place marks of identification, in your own handwriting, upon any or all of the papers that were produced before the Federal grand jury in session in the eastern district of New York, during the month of July, 1903, while the matter of United States *vs.* George W. Beavers was under inquiry or investigation?

Objected to. Objection sustained. Exception taken.

Q. Did you during the month of July, 1993, or any time previous thereto, see any contracts purporting to be, or actually being, between the United States Government, or any department thereof, and the Edward J. Brandt-Dent Co.?

Objected to. Objection sustained. Exception taken.

Q. Did you in the grand jury room, during the month of July, 1903, in the presence of the grand jurors and while you were in attendance upon them, and while the matter of The United States *vs.* George W. Beavers was under inquiry or investigation, see any contract between the United States Government, or any department thereof, and the Edward J. Brandt-Dent Co.?

Objected to. Objection sustained. Exception taken.

Q. Did you, during the month of July, 1903, or at any time previous thereto, outside of the grand jury room, see any contract between the Edward J. Brandt-Dent Co. and The United States Government, or any authorized department thereof, by the terms of which the United. States Government or any authorized department thereof, did purchase, or was to purchase, two hundred and fifty, or any other number, of the Brandt automatic cashiers, from the Edward. J. Brandt Dent Co.?

Objected to. Objection sustained. Exception.

Q. Did you during the month of July, 1903, in the grand jury room, and in the presence of the grand jurors or in their absence, see the contract referred to in my last question?

Objected to. Objection sustained. Exception taken.

Q. Did you during the month of July, 1903, in the grand jury room of the Federal grand jury for the eastern district of New York, and in the presence of the grand jurors and while you were in attendance upon them, see the contract or a paper purporting to be such a contract as the one referred to in the two previous questions?

Objected to. Objection sustained. Exception taken.

Q. Did you during the month of July, 1903, see anywhere any letters, paper writing, memoranda, or

correspondence of any kind between the Edward J. Brandt-Dent Co. and the United States Government, or any official thereof; or did you see any paper, memorandum or writing or correspondence purporting to be between the United States Government, or any official thereof, and the Edward J. Brandt-Dent Co., or any officer thereof?

Objected to. Objection sustained. Exception taken.

Q. Did you during the month of July, 1903, in the grand jury room of the Federal grand jury in session in the eastern district of New York during July, 1903, see any such letters, paper writings, memoranda, or correspondence, either actually being or purporting to be between the Edward J. Brandt-Dent Co., or any officer thereof, and the United States Government, or any official thereof?

Objected to. Objection sustained. Exception.

Q. Did you during the month of July, 1903, and in the presence of the grand jurors then in session in the eastern district of New York, in your own handwriting place any marks of any kind upon any such papers as were referred to in the two previous questions?

Objected to. Objection sustained. Exception taken.

Q. Do you know of your own knowledge the names of the persons who attended as witnesses upon and before the Federal grand jury in the eastern district of New York during the month of July, 1903, while the matter of The

United States vs. George W. Beavers was under inquiry or investigation?

Objected to. Objection sustained. Exception taken.

Q. Now will you give us the names of the persons who did attend as witnesses before that Federal grand jury in session during the month of July, 1903, in the eastern district of New York while the matter of The United States *vs.* George W. Beavers was under inquiry or investigation?

Objected to. Objection sustained. Exception taken.

Q. Do you know whether the Federal grand jury, as it was made up and constituted for the month of July, 1903, in the eastern district of New York, is still in session or not?

Objected to.

The Commissioner: What are the grounds?

Mr. Burnett: The ground is, it is a question of law perhaps whether it is still in session, and calls for a conclusion. Our grand jury is in session, as your honor knows—is supposed, in one view of the law, to be in session continuously, although we do not call them actually together except once a month or once in two months, and I do not think they have a right to—into the personnel of that grand jury through the instrumentality of the district attorney. It is a question of law.

The COMMISSIONER: How is the question material, Mr. Steuer?

Mr. STEUER: The question is material in this, that while I do not think that the body is in actual session, I have a right to show that that which was before it did not warrant its action, and I contend that after its session is closed I have a right to show that that which was before it did not warrant its action. I want it to appear as a matter of record, so that it should not afterwards appear that I did not show that this body was still in session at the time I was pro-pounding these questions. If these rulings are correct, let me suggest—and you are right that we have no right, under any conditions or circumstances, to disclose what transpired before the Federal grand jury—what, difference does it make whether it appears on the record that the personnel or that gerund jury is no longer in session? On the other hand, if I am right in my contention, it would not be fair, that we should come back for the purpose of determining whether the grand jury is in session. No court will exclude this testimony if I have a right to use it, because of my inability to show that that grand jury is not in question.

The COMMISSIONER: You may answer that question, if you know.

Mr. BURNETT: The records of the court are the best evidence.

The COMMISSIONER: Well, I say if she knows.

Mr. STEUER: Whether it is or is not in session, that is all the question is; the grand jury was in session in 1903.

The WITNESS: It is not, as far as I know.

Testimony of William J. Youngs

WILLIAM J. YOUNGS, being duly sworn, testified as follows:

Examined by Mr. STEUER:

Q. Mr. Youngs, during the month of July, 1908, were you at any time in attendance upon the Federal grand jury in session in the eastern district of New York?

Objected to by Mr. Burnett. Objection sustained. Exception taken.

Q. You are acquainted, Mr. Youngs, with all of the assistant district attorneys for the eastern district of New York, are you not?

A. Yes, sir.

Q. And is Miss Amy Wren a United States assistant district attorney for the eastern district of New York?

A. Well, under the decisions of the United States Supreme Court I should say yes.

Q. Have you ever appointed her as your assistant United States attorney?

A. I do not have the appointment.

Q. Who has?

A. I believe the Department of Justice at Washington appoints; that is my recollection of it.

Q. Have you over made any recommendation that Miss Amy Wren be appointed to be United States assistant district attorney?

Objected to. Objection sustained. Exception taken.

Q. Now, regardless of what the United States court decisions are—because I have not asked you for this, Mr. Youngs—I want to know whether Miss Amy Wren was, in the month of July, 1903, United States assistant district attorney?

Mr. BURNETT: I object, if your honor please. She was on. the stand and has stated the whole case.

The COMMISSIONER: I do not think there is any harm in answering the question.

A. Well, I don't know how to answer your question, Mr. Steuer, but if you will allow one I will tell you why.

The COMMISSIONER: You may state the reason, Mr. Youngs.

The WITNESS: Miss Wren was a hold-over, and she was appointed during Mr. Pettit's administration, and when I was in there it was not necessary for her to be appointed at all, but she is a hold-over from Mr. Pettit, and I really know nothing about it at all. I never looked at the oath of office or anything else.

Q. Did you assign her to duty during the month of July, 1903, as U. S. assistant district attorney?

Mr. BURNETT: I do not see the relevancy or competency of any of that testimony.

Objection sustained. Exception taken.

Q. Can you tell us, Mr. Youngs, the present whereabouts of the documents enumerated in this paper that I show you? (Handing witness a copy of a paper purporting to be a *subpoena duces tecum* directed to William J. Youngs, Esq., and signed by Samuel M. Hitchcock, U. S. commissioner for the southern district of New York, and the paper is marked Exhibit 1 of this date for identification.)

Mr. BURNETT: I object; this is going into the writings, proceedings of the district attorney, his knowledge, or what knowledge he had, his proceedings in executive office. I do not think it is competent.

Objection sustained. Exception taken.

Q. Are those papers or documents, or any of them, at the present time in your possession?

Objected to. Objection sustained. Exception taken.

Q. I ask you, Mr. Youngs, to produce those papers, or such of them as you have at the present time in your possession.

Mr. BURNETT: And by the district attorney now in charge of the matter on the part of the Government, be is instructed not to produce them, and I object to his producing them, and I ask the commissioner to so rule.

The COMMISSIONER: I so rule.

Mr. STEUER: I except.

Q. Mr. Youngs you are at present United States district attorney for the eastern district of New York?

A. I am.

Q. And you were in the month of July, 1903?

A. Yes, sir.

Q. Can you tell us, Mr. Youngs, the names of the witnesses who attended upon the Federal grand jury that was in session in the eastern district of New York during

the month of July, 1903, and while the matter of The United States *vs.* George W. Beavers was under inquiry or investigation?

Objected to. Objection sustained. Exception taken.

FRANK E. LITTLE, recalled.

(By Mr. STEUER:)

Q. Mr. Little. have you any personal knowledge of what were the duties of George W. Beavers while he was the superintendent of salaries and allowances in the office of the First Assistant Postmaster General of the United States?

Mr. WISE: I object on the ground that he has not claimed to have any personal knowledge. He made the complaint in this action on information and belief; based his information and belief on a certified copy of the indictment which was attached to the complaint.

The COMMISSIONER: Are the duties of that office prescribed by law.

The WITNESS: They are prescribed by law, and those that are not statutory are prescribed by the regulations of the Postmaster General.

The COMMISSIONER: You may answer.

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A. Only in so far as the regulations prescribe the duties.

Q. Those regulations that you referred to and from which you derive your knowledge, are they reduced to writing?

A. They are in printed form.

Q. Have you a copy of them here?

A. I have not.

Q. Did you ever examine a copy of them?

A. I have.

Q. Then in so far as in your complaint, which you verified on the 3rd day of September, 1903, as you therein attempt to set out the duties with the performance of which George W. Beavers was charged, you derived your knowledge from those rules and regulations?

Mr. WISE: I object. The complaint is the best evidence; it states what it states, and the witness ought not to be called upon to explain it.

The COMMISSIONER: I think that is a proper question, Mr. Wise.

A. To a considerable extent, yes.

Q. Now, then, beyond that considerable extent, from what other sources did you derive your knowledge as to his duties?

A. From being on duty in the post office in Washington, and having occasion to visit the office quite frequently.

Q. Now tell us what you know of the duties with the performance of which George W. Beavers was charged, in so far as you derived your knowledge of those duties from your service in the post office and your visits to the department.

Mr. WISE: I object to that question as immaterial.

Mr. STEUER: He said he derived his knowledge from the rules and regulations. Had he stood by that and said "That is my knowledge," that would have ended our inquiry on that subject. But he says he got information from visiting the office. I am not willing that he should make a record that he had knowledge outside of the rules and regulations, and then not have it appear that he had not.

A. I can say I never saw him perform any duties except such as are prescribed by the regulations.

Q. Well, then, you do not know of any duties he was charged with, except such as are prescribed by the rules and regulations?

A. No.

Q. Do you now recall your own whereabouts on the 25th day of July, 1900, Mr. Little?

A. I could not recall where I was on that particular day unless I have reference to papers.

Q. Well, have you any papers here. to which yen might refer, that would refresh your recollection?

A. I have not.

Q. When did you first make the acquaintance of Mr. Beavers, Mr. Little?

A. In 1893, as I recollect.

Q. Do you happen to recall whether you saw him at all on the 25th of July, 1900?

A. 25th of July, 1900?

Q. Yes.

A. No, I could not recall.

Q. Can you state whether on the 25th of July, 1900, you were in the borough of Brooklyn?

A. 25th of July, 1900, I don't think I was.

Q. Well, couldn't you make that certain by stating positively whether you were or not?

A. The only way I can answer that is by saying that I am on the road continuously. I might have been in New York that day and I might have gone over to Brooklyn; but I can't say as to that. It is a matter in which it is impossible to say without reference to some data.

Q. Did you ever see Mr. Beavers write?

A. I have.

Q. And do you know his handwritings?

A. To a certain extent, yes.

Q. Did you ever see any agreement or contract of any kind signed by Mr. Beavers between him and the Edward J. Brandt-Dent Co.?

Mr. WISE: I object to that as immaterial and incompetent. Objection sustained. Exception taken.

Q. Did you ever see Mr. Beavers in the company of any officer or any person connected with the Edward J. Brandt-Dent Co.?

Objected to. Objection sustained. Exception taken.

Q. Did you see him on the 25th of July, 1900, with any officer or any representative of the Edward J. Brandt-Dent Co.?

Objected to. Objection sustained. Exception.

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Q. Did you ever hear any conversation between Mr. Beavers and any officer or other person representing the Edward J. Brandt-Dent Co?

Objected to. Objection sustained. Exception taken.

Q. Did you derive all your knowledge with respect to the existence of any contract of agreement between George W. Beavers and the Edward J. Brandt-Dent Co. from your examination and inspection of the certified copy of the indictment referred to in your complaint?

Objected to.

Mr. Burnett: This is an officer of the Post Office Department acting directly under the authority and orders of the Attorney General, and it seems to me that it is not competent or proper to undertake to probe by this sort of process the knowledge and action of that executive department of the Government in investigating these cases or in bringing the criminals to justice. I do not think it is proper or competent to do that any more in the case of Mr. Little than of Mr. Youngs as a part of the executive department.

Objection sustained. Exception taken.

Q. Will you tell us please what information you have, or what knowledge you have, as to the existence of any contract made on the 25th of July, 1900, or at any other time, between George W. Beavers and the Edward J. Brandt-Dent Co.?

Objected to. Objection sustained. Exception taken.

Q. Will you tell us what knowledge or information you have, or ever did have, with respect to the making of any contract, or the existence of any contract or agreement, between the Edward J. Brandt-Dent Co. and George W. Beavers, by the terms of which George W. Beavers was to recommend to the First Assistant Postmaster General the order and purchase of 250 automatic cashiers for the use of the Post Office Department of the United States, and to procure a contract from the same for that company?

Same objection, ruling and exception.

Q. Did you ever have, or have you now, any knowledge on that subject other than that which you derived from examination and inspection of the indictment, or a certified copy thereof, referred to in your complaint?

Same objection, ruling and exception.

Q. Did you ever know of, or do you now know of, the existence of any contract between George W. Beavers and the Edward J. Brandt-Dent Co., of any kind?

Same objection, ruling and exception.

Q. Were you ever present at the making of any contract of kind between George W. Beavers and the Edward J. Brandt-Dent Co.?

Same objection, ruling and exception.

Q. Do you know of any appropriations that were made by the United States Government for the purchase of automatic cashiers from the Edward J. Brandt-Dent Co.?

Same objection, ruling and exception.

Q. Do you know of any contract between George W. Beavers and the Edward J. Brandt-Dent Co., by the terms of which he was to receive any portion for his own private use, of the moneys appropriated by the United States Government for the purchase of automatic cashiers from the Edward J. Brandt-Dent Co.?

Same objection, ruling and exception.

Q. Do you know of the fact as to whether George W. Beavers ever received any portion of any such moneys?

Same objection, ruling and exception.

Q. Did you ever know of the fact as to his having received any portion of any such moneys?

Same objection, ruling and exception.

Q. In making the allegation in your complaint, which was verified on the 3rd day of September, 1903, that George W. Beavers on the 25th of July, 1900, in the borough of Brooklyn, in the city and State of New York, and in the eastern district of New York, had made a fraudulent agreement with the Edward J. Brandt-Dent Co.—where did you derive your knowledge and information from?

Mr. WISE: I object. The complaint speaks for itself.

The COMMISSIONER: Does not the complaint set out where he derived his knowledge and information from?

Mr. STEUER: I am not bound by what he swore to. What difference does it make what he swore to, if I want to find out what the fact is?

The WITNESS (after examining the last par. on the second page of the complaint): I make the same answer to that I made in the written examination, in the official affidavit.

Q. That you derive your knowledge and information from an examination of the indictment? After examining the paper you verified, you say, "My answer is the same as I made in the complaint?

A. In that portion of the affidavit.

Q. Which refers to your sources of information?

A. Yes, sir.

Q. Will you please tell me now what sources of information you had with respect to that fraudulent contract which you swore existed between George W. Beavers and the Edward J. Brandt-Dent Co., and which was made on the 25th day of July, 1900?

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A. The result of an investigation covering three months, or thereabouts, in which I interviewed all parties connected with the Edward J. Brandt-Dent Co., its agents and officers, and examined the files of the Post Office Department pertaining to that particular subject.

Q. Did you ever talk to anybody connected with the Edward J. Brandt-Dent Co., in the presence of Mr. Beavers?

A. No.

Q. Were you ever present at any talk between Mr. Beavers and any person representing the Edward J. Brandt-Dent Co.?

A. No.

Q. Did you ever see any paper-writing between Mr. Beavers and the Edward J. Brandt-Dent Co., or any of its officers?

Objected to. Objection sustained. Exception taken.

Q. Were you ever present when Mr. Beavers procured any contract for the Edward J. Brandt-Dent Co. from the United States Government?

A. No.

Q. Were you ever present when he aided in procuring a contract for the Edward J. Brandt-Dent Co.?

A. No.

Q. Did you ever see anybody on behalf of the Edward J. Brandt-Dent Co. pay any money to Mr. Beavers?

A. No.

Q. Do you know of any concern, other than the Edward J. Brandt-Dent Co., that manufactured automatic cashiers of the same kind and character ns this, which they manufactured or supplied to the United States Post Office Department?

A. No.

Q. Did you ever buy any of those machines?

Mr. BURNETT: I object as totally immaterial. Objection sustained. Exception taken.

Q. Did you ever see them purchase,—Mr. Little—?

Objected to. Objection sustained. Exception.

Q. —or sell machines?

Objected to. Objection sustained. Exception taken.

Mr. STEUER: You have allowed this question, Mr. Commissioner.

The COMMISSIONER: Well, I have reconsidered, Mr. Steuer.

Mr. STEUER: I except.

Q. Did you ever sell such machines, Mr. Little?

Objected to. Objection sustained. Exception taken.

Q. Did you ever see them sold?

Same objection, ruling and exception.

Q. Did you ever hear any conversation between George W. Beavers and the First Assistant Postmaster General?

A. I have.

Q. Did you ever hear any conversation between George W. Beavers and the First Assistant Postmaster General with respect to the purchase of 250 automatic cashiers?

A. I have not.

Q. Did you ever see Edmund H. Driggs and George W. Beavers together?

A. I have not.

Q. Did you ever see Edmund H. Driggs give any money to George W. Beavers?

A. No.

Q. Did you ever hear any conversation between Edmund H. Driggs and George W. Beavers?

A. No.

Q. You know George F. Miller, Mr. Little?

A. I do.

Q. Did you ever see George F. Miller and George W. Beavers together?

A. I could not say positively that I have or not.

Q. Did you ever hear any conversation between George W. Beavers and George F. Miller?

A. I have not.

Q. Did you ever see George F. Miller give George W. Beavers any money?

A. No.

Q. Did you ever see Edmund H. Driggs give George W. Beavers any check?

A. No.

Q. Did you ever see George P. Miller give George W. Beavers any check?

A. No.

Q. Do you happen to recall where you were on the 28th day of November, 1900?

A. I do not.

Q. Do you happen to recall whether you saw George W. Beavers on that day?

A. I could not say.

Q. Did you know anybody connected with the Ed ward J. Brandt-Dent Co. on the 25th of July, 1900?

A. Not beyond a knowledge by sight; not acquaintances.

Q. Had never been introduced to or spoken with any person in hat concern?

A. Never.

Q. Now, are those answers equally correct, or would you make the same answers with respect to the 28th of November, 1900?

A. Same thing.

Q. Did you hear any conversation at any time between George W. Beavers and anybody representing the J. Brandt-Dent Co., concerning a contract for the purchase of 250 of its automatic cashiers?

A. No.

Q. Did you ever see any paper writing between George W. Beavers and the Edward J. Brandt-Dent Co., with respect to the purchase of 250 automatic cashiers?

Objected to. Objection sustained. Exception taken.

Q. You have spoken in the course of your acquaintance, to Mr. Beavers, haven't you?

A. I don't understand the purport of your question.

Q. I say, in the course of your acquaintance I suppose you have spoken to George W. Beavers?

A. Usually spoke whenever we have met for the last ten years.

Q. Did you ever speak to him about the contract between himself and the Edward J. Brandt-Dent Co.?

A. Never.

Q. Did you speak about any transactions between himself and George F. Miller?

A. Never.

Q. Did you ever speak to him with respect to any transaction between himself and Edmund H. Driggs?

A. Never.

Q. Ever speak to him about his procuring, or aiding in procuring, any contracts for the Edward J. Brandt-Dent Co. from the United States Government?

A. No.

Q. Nor of his recommendations with respect to such contracts to the First Assistant Postmaster General?

A. No.

Q. You never spoke to him about having received any money from Miller from the Edward J. Brandt-Dent Co. through Miller, or from Driggs from the Edward J. Brandt-Dent Co. through Driggs, have you?

A. No.

Q. Did you ever hear any conversation between Edmund H. Driggs and any other representative of the Edward J. Brandt-Dent Co.?

A. Well, I have to explain that. No conversation pertaining to this particular matter. I have seen Mr. Miller and Mr. Driggs in conversation but not that I knew they were talking about anything pertaining to the things here.

Q. Did you hear the conversation?

A. I did.

Q. Did you ever hear any conversation between Mr. Edmund H. Driggs and any person representing the Edward J. Brandt-Dent Co. with respect to Mr. Driggs' position in that company, have you?

A. Never.

Q. And you never saw any paper writing which fixed the position of Edmund H. Driggs with the Edward J. Brandt-Dent Co., did you?

Objected to. Objection sustained. Exception taken.

Q. Where did you derive your information with respect to the capacity in which Edmund H. Driggs was serving the Edward J. Brandt-Dent Co., or did you ever have any information on that subject?

Mr. BURNETT: Now your question is double-barreled. Keep them separate.

Q. Did you over have any information with respect to the capacity, if any, in which Edmund H. Driggs was serving the Edward J. Brandt-Dent Co.?

A. Yes.

Q. From whom did you derive your information?

Objected to.

A. My knowledge was obtained from Edmund H. Driggs himself.

Q. And was he the sole source of your information?

Objected to.

A. Not entirely from Mr. Driggs.

Q. Mr. Little, do you know the present whereabouts of Inspector Oldfield?

A. I do not.

Mr. STEUER: If I can secure the attendance of Inspector Oldfield—he is the only witness I want to examine—then I will be ready to close.

Mr. BURNETT: Another ground for delay. Have you a subpoena issued on him?

The COMMISSIONER: There was a subpoena issued yesterday.

Mr. BURNETT: If the commissioner thinks it proper and within his province, I should like to have the gentlemen

state what they expect to prove by Mr. Oldfield, so as to show its materiality, and not take up all this time in delays.

Mr. STEUER: I think we have a right to have the record determine whether it is material or not.

Mr. Steuer suggested the following stipulation: First, that Mr. Oldfield was a witness before the grand jury: second, that he had no personal knowledge of the facts alleged in the complaint.

Mr. BURNETT: His first proposition is passed on here: He cannot go into the question whether Mr. Oldfield was before the grand jury or not, or what took place before the grand jury when Mr. Oldfield was there. His other proposition is that he had no personal knowledge of those transactions. I am willing to admit he had no personal knowledge. But whatever testimony he gave, what papers he produced, are not for the inquiry of this tribunal, is improper here, and it is simply doing a vain thing, this adjournment, and nothing, legally is gained for the other side, and is only injustice to the Government, this tedious delay in bringing the matter to a close.

The COMMISSIONER: Mr. Steuer, is it your judgment that the United States attorney may not make such a stipulation before me as will bind the Government?

Mr. STEUER: Yes, sir, absolutely, with respect to what a witness will or will not know.

The COMMISSIONER: With respect to what the witness will testify, that the testimony before the commissioner will be so and so?

Mr. STEUER: Positively.

Mr. BURNETT: In the State courts same effect follows same cause, as if the witness appeared or not.

The COMMISSIONER: If Mr. Oldfield does not appear before the commissioner at the next hearing, I will ask the district attorney to make the stipulation.

Mr. Little agrees to have Mr. Oldfield in attendance on the adjourned day.

Hearing adjourned to Monday, November 3, 1903, at 2 o'clock p.m.

UNITED STATES
vs.
GEORGE W. BEAVERS. } No. 1

NEW YORK, *November* 2, 1903.

Met pursuant to adjournment.

Present: The commissioner, Henry L. Burnett, Esq., and Mr. Henry A. Wise, for the Government. Mr. Seabury, for the defendant.

Appendix D

Testimony of John F. Oldfield

JOHN F. OLDFIELD, called on behalf of the defendant, being duly sworn, testified as follows:

Examination by Mr. SEABURY:

Q. Mr. Oldfield, where do you reside?

A. I reside in Ellicott City, Maryland.

Q. What is your business?

A. I am a post office inspector.

Q. How long have you been such?

A. Since 1897, I think; 1897 or '98.

Q. As inspector of the Post Office Department, were you assigned to work with Mr. Frank E. Little?

A. I was.

Q. When?

A. The 1st of May of this year, or the latter part of April.

Q. Did you make any investigations with reference to the matter of the United States against George W. Beavers?

A. I did.

Q. Did you know Mr. Beavers personally?

A. I do.

Q. When did you meet him?

A. I think I first met Mr. Beavers in 1897 in Washington.

Q. Whereabouts?

A. In the Post Office Department.

Q. Do you know where Mr. Beavers was engaged, or whether the was in the service of the department or not?

A. He was superintendent of the salary and allowance division of the Post Office Department that time.

Q. Do you recollect where you were on the 25th of July, 1900?

A. I do not.

Q. Do you know whether you were in Brooklyn?

A. I do not.

Q. Are you familiar with the duties of Mr. Beavers while he was engaged as superintendent of the salary and allowance division?

A. Only so far as I know the rules and regulations.

Q. You don't know any further than the rules and regulations. You have road them?

A. I have read them over.

Q. You couldn't specify what his duties are?

A. Not at the present time.

Q. Do you know whether or not any appropriation had been made in July, 1900, for the purchase of any Brandt-Dent automatic cashiers?

A. I do not.

Q. Do you know whether any such cashiers were purchased for the Government during that year?

A. I do.

Q. Do you know by whom they were purchased?

A. Purchased by the Post Office Department through Mr. Beavers.

Q. When you say "through Mr. Beavers," what do you mean?

A. Well, I mean that the order came through the salary and allowance division.

Q. And what branch of the Post Office Department is that?

A. That is in the First Assistant Postmaster General's office.

Q. And how were these articles purchased: by contract?

A. Purchased by order; an order for 250 cashiers.

Q. In what form was that order?

Mr. BURNETT: I object to that. If it is in writing, it is the best evidence.

Q. Do you know whether it was in writing?

A. It was in writing.

Q. Did you ever see such order?

A. I have seen it.

Q. Where have you seen it?

A. We had it in our possession.

Q. When?

A. Well, during this investigation.

Q. Well, at what time?

A. Well, some time in May we received it, and I think it is still in the possession of the Government.

Q. From whom did you receive it, Mr. Oldfield?

A. I forget whether we received it from Mr. Brandt; I won't be positive of that; but we received it from the Brandt-Dent Co.

Q. What did you do with it?

A. Well, now, I could not say whether it is in Washington or not. It is among a lot of papers.

Q. Did you deliver that with other papers?

A. Yes.

Q. To whom did you deliver it?

A. I expect the chief inspector has it.

Q. Chief inspector of what?

A. Of the Post Office Department; Mr. Cochran.

Q. You say you delivered it to him as recently as what; May, 1903?

A. I cannot answer it correctly, but we had that order in our possession, for 250 cashiers. I haven't seen it since the grand jury was in session over in Brooklyn.

Q. Do you know whether it was present before the grand jury in Brooklyn?

Objected to. Objection sustained. Exception taken.

Q. Did you see it in Brooklyn?

A. I can't say that I did.

Q. Where is Mr. Cochran that you spoke of?

A. Mr. Cochran is chief inspector at Washington, and when I say Mr. Cochran has it—I agreed to deliver all the papers to our chief—I won't say that Mr. Cochran has that paper. But we have a great mass of correspondence.

Q. Did we understand you, Mr. Oldfield, that that order for the purchase of 250 Brandt automatic cashiers is one document?

A. Was one document, yes.

Q. And do you recall by whom it was signed?

Mr. BURNETT: I object. Going into the record's of the executive office; incompetent, and it is secondary evidence; a written instrument, the contents are the best evidence.

Objection sustained. Exception.

Q. Did you ever read that contract or document, Mr. Oldfield?

A. I think I have.

Q. Do you recall its contents?

A. No, I do not.

Q. Do you recall its date?

A. I do not.

Q. Do you recall what, if any, signatures were upon it?

A. I do.

Q. You now recall what names those signatures were?

A. I do.

Q. Now I ask you to state what names there were?

Objected to. Objection sustained. Exception taken.

Q. Mr. Oldfield, you have seen the cashiers in question, that is to say, the Brandt-automatic cashiers, have you not?

A. I have.

Q. Do you know where those cashiers can be purchased in the open market?

A. I do not.

Q. Do you know of any other machines that answer the same purpose that can be purchased in the open market?

Objected to as immaterial. Objection sustained. Exception taken.

Q. Mr. Oldfield, do you know whether or not it was the duty of the supt. of salary and allowance division to make contracts for and on behalf of the department?

Mr. BURNETT: I object: it is a conclusion of law; it is not competent.

Objection sustained. Exception taken.

Q. Mr. Oldfield, do you recall where you were on the 28th day of November, 1900?

A. I do not.

Q. Do you know whether you were in the borough of Brooklyn on that day?

A. I do not.

Q. Do you know whether you saw Mr. Beavers on that day?

A. I do not.

Q. Did you see any officer of the Edward J. Brandt-Dent Co. on that day?

A. I did not.

Q. Did you see either Mr. Beavers or any officer of the Edward J. Brandt-Dent Co. on the 25th day of July, 1900?

A. I can't say; I don't remember.

Q. Did you on the 25th of July, 1900, see Mr. Edmund H. Driggs?

A. I do not remember as I did.

Q. Are not you sure that you did not?

A. What date was that?

Q. The 25th of July, 1900.

A. I don't think I saw Mr. Driggs on that day.

Q. Do you know Mr. Driggs now?

A. I do.

Q. When did you meet him?

A. I cannot answer that question; but since this investigation.

Q. Did you on the 25th of July, 1900, see Mr. George F. Miller?

A. I did not.

Q. Did you know him at that time?

A. I did not.

Q. Did you know him on the 28th of November, 1900?

A. I did not.

Q. On the 28th of November, 1900, did you know Mr. Driggs?

A. I did not.

Q. You did not see either of those two men on either of those dates, did you?

A. No, sir.

Q. And did you see any officer of the Edward J. Brandt-Dent Co. on either July 25th, 1900, or November 28, 1000?

A. I did not.

Q. Did you ever overhear any conversation between Mr. Beavers and anybody else?

Objected to as incompetent on the face of it; anybody else.

Q. I will make it more specific. Did you ever overhear a conversation between Mr. Beavers and any officer of the Edward J. Brandt-Dent Co.?

A. I did not.

Q. Ever overhear any conversation between him and Mr. Driggs?

A. I did not.

Q. Or Mr. Miller?

A. No.

Q. Do I understand you to say, Mr. Oldfield, that you knew that 250 automatic cashiers were purchased by the

Government from the Edward J. Brandt-Dent Co. on the 25th of July, 1900?

A. I did.

Q. Do you know whether any more than 250 cashiers were purchased?

A. Only from the records of the department.

Q. Did the records show a purchase of any more than 250 cashiers?

Objected to, that the records are the best evidence. Objection sustained. Exception taken.

Q. Do you of your own knowledge know of any other purchase than the purchase of 250 cashiers on July 25, 1900?

Mr. BURNETT: Outside of the records; of your own knowledge?

A. I do not.

Q. How do you know of your own knowledge that 250 cashiers were purchased by the Government?

A. The way I know it is that Mr. Edward J. Brandt said he delivered them; the postmaster at Watertown said he delivered them. The records show they were sent by registered mail to that office.

Q. What records?

A. Of the Watertown post office.

Q. That is your source of knowledge as to the 250 machines?

A. Yes, sir.

Q. Have you any other knowledge on the subject?

A. George F. Miller told me they sold to the Post Office Department.

Q. When did he make that statement?

A. I can't recall the date, but in his office.

Q. Did he state that 250, cashiers were sold to the Government on July 25th, 1900?

Objected to. Objection overruled.

A. He stated that those 250 machines were delivered to the Post Office Department.

Q. As referring to those alleged, to those 250 machines alleged to have been sold?

A. Referring to that 250 machine order.

Q. On July 25th, 1900, did you know of your own knowledge whether or not Edmund H. Driggs was in the employ of the Edward J. Brandt-Dent Co.?

A. I did not.

Q. You have stated that you know nothing of any contract supposed to have been in existence between George W. Beavers and the Edward J. Brandt-Dent Co.?

A. I so stated.

Q. Do you know of your own knowledge that Mr. Beavers ever received any money for procuring, or aiding to procure, a contract from the Government for the purchase of 250 machines, or any other number of Brandt automatic cashiers?

A. I do not.

Q. Do you know of your own knowledge how this contract for the purchase of 250 automatic cashiers on July 25th, 1900 was placed with the Government?

A. I do not.

Q. You have stated, as I recall your testimony, Mr. Oldfield, that you did not see on July 25, 1900, Mr. Beavers and Mr. Driggs, or any officer of the Edward J. Brandt-Dent Co., together; is that correct?

A. I did not.

Q. Have you seen them together at any subsequent date?

A. I never have.

Q. You never saw Mr. Beavers with any officer of the Edward J. Brandt-Dent Co.?

A. I have not.

Q. I ask you the same question with reference to George F. Miller; ever see Mr. Beavers and George F. Miller together?

A. I have not.

Q. Well, as I understand you, Mr. Oldfield, your only knowledge of the alleged transaction between Mr. Beavers and any officer of the Edward J. Brandt-Dent Co. is derived from the files of the department; is that right?

Mr. BURNETT: Objected to. It is assuming a fact he has not testified. It is in the records of the department in his investigations, and is from the records of the department.

A. Derived from the files of the department and from personal investigations of the officers of the Edward J. Brandt-Dent Co.

Q. What do you mean by investigations: what did they consist of?

A. Mr. Little and I investigated the case.

Q. How did they do it?

Objected to. Objections sustained. Exception taken.

Q. Did you derive any information with reference to the investigation from the files of the department?

A. In reference to the sale of the machines, we did.

Q. What information with reference to the sale of the machines did you ascertain from that source?

Objected to; that the records are the best evidence.

Objection sustained. Exception taken.

Q. Will you briefly describe what those records are that you refer to?

A. Well, it will be impossible to do that at the present time.

Q. Why?

A. Well, it has been some time since I looked over the papers and I cannot recall without going over the papers in the case.

Q. Don't you recall any of them, Mr. Oldfield?

A. No, I do not; not just now.

Q. You do not know what records you examined at all?

A. Well, we examined all the records bearing on the case.

Q. What records did you examine; records in the Patent Office?

A. In the Post Office Department; not Patent Office.

Q. Then your investigations were confined to those records of the Post Office Department; is that correct?

A. Yes, sir.

Q. That is, the records of the First Assistant Postmaster General's office; or did it go beyond that?

A. No; it would be in the First Assistant's office; in the office in which Mr. Beavers was working.

Q. Did you derive any information outside of those records relating to this alleged contract between the Government and the Edward J. Brandt-Dent Co. for the purchase of 250 automatic cashiers on July 25, 1900?

A. I did.

Q. What were your other sources of information on the subject?

Objected to. Objection sustained. Exception taken.

Q. Did you ever derive any information relating to the purchase of these machines, from Mr. Beavers?

A. Never did.

Q. Did you ever derive any such information from Mr. Driggs?

A. I did.

Q. When?

A. It was during the investigation; I cannot recall the dates.

Q. Did you call on Mr. Driggs during that time?

A. I did.

Q. Have a conversation with him?

A. I did.

Q. Did you derive any information from Mr. George F. Miller?

A. I did.

Q. When did you derive that information?

A. During the investigation; I cannot recall the date.

Q. What information did yon derive?

Objected to. Objection sustained. Exception taken.

Q. What information, if any, did you derive as to the existence of an agreement alleged to be existing—to have existed—between Mr. Beavers and the Edward J. Brandt-Dent Co. by which the Edward J. Brandt-Dent Co. agreed to pay Mr. Beavers a certain sum of money for procuring, or aiding to procure, a contract from the Government?

Objected to. Objection sustained. Exception taken.

Q. Have you any such information whatever relating to that alleged contract?

A. Yes, I have.

Q. What information have you?

Objected to. Objection sustained. Exception taken.

Q. Do you know of your own knowledge that such was the fact,—that is to say, that there was an agreement between the Edward J. Brandt-Dent Co. and Mr. Beavers by which the company agreed to pay Mr. Beavers any sum of money for procuring, or aiding to procure, a contract from the Government?

A. Not of my own knowledge.

Q. What was the source of your information?

Objected to.

Mr. SEABURY: This is as to the other contract, Mr. Commissioner; not as to the contract between the Government—

The COMMISSIONER: The contract by which the Brandt-Dent Co. agreed to pay Mr. Beavers a certain sum of money.

Mr. SEABURY: Yes.

The COMMISSIONER: Objection sustained.

Exception taken.

Q. Were you in attendance upon and before the Federal grand jury for the eastern district of New York, in the month of July, 1903?

Objected to. Objection sustained. Exception taken.

Q. Did you appear before the Federal grand jury for July, 1903, in the eastern district of New York, in July, 1903?

Objected to. Objection sustained. Exception taken.

Appendix D

Mr. SEABURY: Mr. Commissioner, in regard to the *subpoenas duces tecum*, we desire to apply for two *subpoenas duces tecum*, which is only for the purpose of keeping my record straight. You will recall that I did apply the other day for a *subpoena duces tecum*, directed to Col. Youngs, and also one directed to Miss Amy Wren, both of which subpoenas you declined at that time to sign. I believe they were marked as exhibits.

The COMMISSIONER: They were marked as exhibits and certified to Judge Holt. (First par. p. 163 of this record.)

Mr. SEABURY: I do not believe there was an exception noted. I want it noted.

I desire to again offer a *subpoena duces tecum* to the same witnesses, requiring the production of the same documents, and request your honor to sign those subpoenas and make them returnable at any day you may name.

The COMMISSIONER: I decline to sign the subpoenas on the ground that they call, on their face, for papers which were submitted to the grand jury; or for the notes taken before the grand jury, and that it is not the practice of the United States courts in this district to allow an inspection of the minutes of the grand jury, and that, in my judgment, this is undertaking, in another way, to obtain an inspection of the minutes of the grand jury.

Mr. SEABURY: I except.

I also desire again to call your honor's attention to the fact that some of the documents called for do not constitute a part of the minutes of the grand jury—are entirely different documents—and I make the same request.

The COMMISSIONER: That request is denied.

Mr. SEABURY: I except.

The COMMISSIONER: The subpoenas produced to-day are marked for identification "A" and "B" of this date.

Mr. SEABURY: The defendant moves to dismiss upon the following grounds:

I. Upon the ground that the bench warrant issued by Judge Thomas was void and insufficient to confer jurisdiction upon the commissioner in that it fails to state facts sufficient to constitute a crime; and, further, because there is not endorsed thereon the written direction of a magistrate in the county wherein it, or the warrant based upon it, was executed, signed by him, with his name of office, and dated at the City or county where. it was made, the following, to-wit: "This warrant may be executed in the county of New York," in accordance with the provisions of section 156 of the New York Code of Criminal Procedure.

II. Upon the ground that the complaint on removal, verified by Frank E. Little, is insufficient to confer jurisdiction upon the commissioner in that it is made solely upon information and belief, and fails to state any proper sources of information and grounds of belief.

III. Upon the ground that without a proper complaint on removal and a proper bench warrant, the commissioner has no jurisdiction to issue his warrant on which the accused was arrested and under which he is held, nor to entertain the proceedings; and that such a warrant is void because issued upon the said bench warrant of Judge Thomas, which latter warrant was not endorsed with, or annexed to, the oath of a credible witness in writing proving the handwriting of the magistrate by whom it was issued—in accordance with section 157 of the New York Code of Criminal Procedure.

IV. Upon the ground that the prosecution has failed to establish probable cause to believe the defendant guilty of the crime charged or of any crime against, the United States.

V. Because there is no evidence before the commissioner tending to establish probable cause to believe the defendant guilty of the crime charged, or any crime against the United States.

VI. Upon the ground that the paper received in evidence as a certified copy of an indictment, alleged to have been found in the eastern district of New York, is entirely without any probative force, and is incompetent as evidence against the accused of the facts therein alleged, or of any facts whatever; (1) Because it is not exemplified, but purports to be only a certified copy of an indictment; (2) Because the name or names of the witnesses on whose testimony it is presumed to have been found, are not endorsed thereon, nor are the names of any such witnesses

endorsed thereon. (3) Because the indictment does not present a clear, consistent and unambiguous statement of facts, but, on the contrary, the statement of alleged facts therein contained is confused, inconsistent and ambiguous. (4) Because at best a certified copy of an indictment can be regarded as but secondary evidence of the facts therein alleged, and that this alleged indictment is not entitled to be, accorded even this weight; for the further reason, that no foundation for the introduction of secondary evidence has been laid; and, further, because at least some of the witnesses who appeared before the grand jury which found the said indictment, and upon whose testimony it is assumed to have been found, were present before the commissioner, and the prosecution refused to call them to the stand and elicit testimony from them, or to submit them to the defense for the purpose of cross-examination, and because of the refusal of the commissioner, after due request, so to do, to instruct the said prosecution to call and place said *witnesses* upon the stand for said purpose.

VII. Upon the ground that the said indictment is insufficient in law on the face thereof, and is demurrable and bad for duplicity in that it completely, clearly and sufficiently charges the defendant with the commission of more than one crime in each of the six separate and distinct counts thereof.

VIII. Upon the ground that the bench warrant issued by Judge Thomas, and the warrant issued by the commissioner herein, are and each was issued in violation of the fourth amendment of the Constitution of the United States, which provides that no warrant shall issue but

upon probable cause, supported by oath or affirmation; and to issue a warrant for the removal of the accused, with the record before the commissioner in its present condition, would be a further violation of said provision of the Constitution and of the rights secured to the accused thereunder.

IX. Upon the further ground that the accused has been denied the rights accorded to him by the Constitution of the United States and the State of New York, and by the statutes of the United States, to be confronted with his accusers and the witnesses against him; and that he has been denied the right to be informed of the name or names of the witnesses who testified against the defendant, or who charged the defendant with the commission of the crime.

X. Upon the ground that the defendant has been denied his right to the process of the commissioner to compel the attendance of witnesses and the production of documents material to his defense, before the commissioner.

XI. Upon the further ground that the defendant has been denied the right to examine and cross-examine the witnesses produced before the commissioner, and because the defendant has been accorded a hearing in form only, and not in substance.

XII. Because of the errors in the admission and exclusion of evidence, committed at the hearing by the learned commissioner.

XIII. Upon the ground that it affirmatively appears that there is lack of probable cause to believe the accused guilty of the crime charged, or any other crime.

The COMMISSIONER: Do I understand one of the grounds of your motion to be that the commissioner has declined to issue subpoenas to witnesses?

Mr. SEABURY: That is, including the *subpoenas duces tecum* to which we refer?

The COMMISSIONER: The commissioner has not declined to issue subpoenas to witnesses, but has only declined to issue the *subpoenas duces tecum*, that have been requested. Your motions are denied.

Mr. SEABURY: I except.

The COMMISSIONER: Is there any other motion, Mr. Seabury?

Mr. SEABURY: No, I have no other motion except to dismiss the proceeding; nothing that I can produce, other than the documents I have seeked to procure.

Mr. WISE: The Government now demands that the accused be committed to await such action as the district judge may decide upon, upon an application for a warrant for removal.

Mr. SEABURY: I ask that the application before Judge Holt for an order of removal be reserved until we can agree upon a date for argument.

Mr. WISE: Well, that the commissioner has nothing to do with.

The COMMISSIONER: I have no further jurisdiction in the matter than to discharge or commit the defendant.

I shall hold to commit the defendant to the custody of the United States marshal to await the order of the district judge.

Appendix D

Ex. 1, Oct. 30/03. G. R. C. Ident.

[L. S.] The President of the United States of America to William J. Youngs, Esq., Brooklyn, N. Y., Greeting:

We command you, that all business and excuses being laid aside, you appear and attend before Hon. Samuel M. Hitchcock, United States commissioner for the southern district of New York at his office room 78 United States court house and post office building in the borough of Manhattan, city of New York in said southern district of New York on the 28th day of October 1903 at 10:30 o'clock in the forenoon to testify and give evidence in a certain action now pending undetermined before said commissioner, for the southern district of New York, between The United States of America, complainant, and George W. Beavers, defendant, on the part of the defendant, and that you bring with you and produce at the time and place aforesaid, any and all documents, papers, requisitions and requests from local postmasters throughout the country for permission to test the machines known as Brandt automatic cashiers and manufactured by the Edward J. Brandt Dent Co. and filed in the Post Office Department between February 1st, 1897 and December 1st, 1900, together with any and all reports made by said postmasters upon said machines and submitted to the said department between the dates above referred to and subsequent thereto. Also all correspondence. letters, telegrams and other evidences of communication between the said The Edward J. Brandt-Dent Company and the Post Office Department of the United States of America

which may be now under your control, also any and all the original contracts or documents relating thereto alleged to have been made by the Government of the U. S. or the Post Office Department thereof with the said The Edward J. Brandt-Dent Company for the purchase from said company of 250 or any other number of their so-called automatic cashiers, now in your custody, and all other deeds evidences and writings, which you have in your custody or power concerning the premises. And for a failure to attend, you will be deemed guilty of a contempt of court, and liable to pay all loss and damages sustained thereby to the party aggrieved, and forfeit two hundred and fifty dollars in addition thereto.

Witness Hon. Samuel M. Hitchcock United States commissioner, at the borough of Manhattan, in the city of New York, the 27th day of October, 1903.

SAMUEL M. HITCHCOCK, [SEAL.]
U. S. Commissioner for Southern Dist. of New York.

MORGAN & SEABURY,
Attorneys for Defendant.

A FOR IDENTIFICATION. S. M. Hitchcock,
U. S. Commissioner.

[L. S.] The President of the United States of America to Miss Amy Wren, c/o U. S. dist. att'y, Brooklyn, New York city, Greeting:

We command you, that all business and excuses being laid aside, you appear and attend before Hon. Samuel M.

Hitchcock, United States commissioner for the southern district of New York at his office room 78, United States court house and post office building—the borough of Manhattan, city of New York, in said southern district of New York on the ___ day of ___, 190–, at ___ o'clock, in the __ noon, to testify and give evidence in a certain action now pending undetermined before said commissioner for the southern district of New York, between The United States of America complainant and George W. Beavers, *defendant* on the part of the defendant and that you bring with you and produce at the time and place aforesaid, *a certain* all minutes, exhibits, records, stenographic notes, documents, and other papers and memoranda of any kind whatsoever made, received and taken at the inquiry of the grand jury of the United States of America held in the eastern district of New York, at borough of Brooklyn, New York, during the month of July, 1903, in the investigation leading to the indictment alleged to have been found against George W. Beavers at said sitting of the grand jury in relation to the alleged Brandt automatic cashiers now in your custody, and all other deeds, evidences and writings, which you have in your custody or power concerning the premises. And for a failure to attend, you will be deemed guilty of a contempt of court, and liable to pay all loss and damages sustained thereby to the party aggrieved, and forfeit two hundred and fifty dollars in addition thereto.

Witness, Samuel M. Hitchcock, United States commissioner, at the borough of Manhattan, in the city of New York, the ___ day of ___, 190–.

___ ___, *Clerk.*

Appendix D

MORGAN & SEABURY,
Attorneys for Defendant.

B FOR IDENTIFICATION. S. M. Hitchcock, U. S. *Counsel.*

[L. S.] The President of the United States of America to Hon. Wm. J. Youngs, U. S. dist. att'y, Brooklyn, N. Y., Greeting:

We command you, that all business and excuses being laid aside, you appear and attend before Hon. Samuel M. Hitchcock, United States commissioner for the southern district of New York at his office room 78 United States court house and post office building in the borough of Manhattan, city of New York, in said southern district of New York, on the ___ day of ___ 190–, at __ o'clock in the __ noon, to testify and give evidence in a certain action now pending undetermined before said commissioner, for the southern district of New York, between The United States of America, complainant, and George W. Beavers, defendant on the part of the defendant and that you bring with you and produce at the time and place aforesaid, *a certain* any and all documents, papers, requisitions and requests from local postmasters throughout the country for permission to test the machines known as Brandt automatic cashiers and manufactured by the Edward J. Brandt Dent Co., and filed in the Post Office Department between February 1st, 1897 and December 1st, 1900, together with any and all reports made by said postmasters upon said machines and submitted to the said department between the dates above referred to and subsequent thereto.

Appendix D

Also all correspondence, letters, telegrams and other evidences of communication between the said The Edward J. Brandt Dent Company and the Post Office Department of the United States of America which may be now under your control, also any and all the original contracts or documents relating thereto alleged to have been made by the Government of the U. S. or the Post Office Department thereof with the said The Edward J. Brandt Dent Company for the purchase from said company of 250 or any other number of their so-called automatic cashiers, now in your custody, and all other deeds, evidences and writings which you have in your custody or power concerning the premises. And for a failure to attend, you will be deemed guilty of a contempt of court, and liable to pay all loss and damages sustained thereby to the party aggrieved and forfeit two hundred and fifty dollars in addition thereto.

Witness Samuel M. Hitchcock United States commissioner, at the borough of Manhattan, in the city of New York, the ___ day of ___ 1903.

___ ___, *Clerk.*

MORGAN & SEABURY,
Attorneys for Defendant.

Appendix D

UNITED STATES OF AMERICA,
Southern District of New York.

UNITED STATES
vs.
GEORGE W. BEAVERS.

Before Samuel M. Hitchcock, United States Commissioner.

I, Samuel M. Hitchcock, United States commissioner, for the southern district of New York, do hereby certify, that the foregoing writings comprise the entire record of proceedings had before me in the above entitled matter.

In witness whereof I have hereunto set my hand and affixed my seal at the borough of Manhattan, city of New York, southern district of New York, this 9th day of November, 1903.

[SEAL.] SAM'L M. HITCHCOCK,
U. S. Commissioner, Southern District of New York.

(Endorsed:) U. S. district court, Filed Nov. 9, 1903, — m. S. D. of N. Y.

UNITED STATES OF AMERICA,
Southern District of New York, *ss:*

I, Thomas Alexander, clerk of the district court of the United States of America for the southern district of

New York, do hereby certify that the writings annexed to this certificate, to wit: the testimony and exhibits taken before Com'r Hitchcock, in the proceeding entitled United States *vs.* George W. Beavers, have been compared by me with their originals on file and remaining of record in my office; that they are correct transcripts therefrom and of the whole of the said originals.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, this 23rd day of December in the year of our Lord one thousand nine hundred and three, and of the Independence of the said United States the one hundred and twenty-eighth.

[SEAL.] THOS. ALEXANDER, *Clerk.*

At a stated term of the circuit court of the United States in and for the southern district of New York, held at the United States court house, and post office building, in the borough of Manhattan, of the city of New York, on the 11th day of November, 1903.

Present: Hon. E. Henry Lacombe, circuit judge.

In the Matter of the Petition of GEORGE W. BEAVERS for the Writs of *Habeas Corpus* and Certiorari.

Order Denying Writ of Habeas Carpus and Certiorari.

On reading and filing the petition of George W. Beavers, verified on the 10th day of November, 1903, for a writ of *habeas corpus*, directed to William Henkel, Esq.,

United States marshal in and for the southern district of New York, requiring him to bring and have the petitioner before this court, together with the true cause of his detention and restraint of the petitioner, to the end that this court may act thereupon, as of right and according to law ought to be done; and for a writ of certiorari directed to Hon. Samuel M. Hitchcock, United States commissioner for the southern district of New York, and to Thomas Alexander clerk of the U. S. district court for the southern district of New York, in aid thereof, commanding that he return all proceedings against your petitioner to this court forthwith for such action as may be proper in the premises; and upon the said writs, and it appearing that the restraint of the said petitioner is not unlawful,

Now, after hearing Max D. Steuer, Esq., of counsel for the said petitioner in support of said writ and Henry L. Burnett, Esq., of counsel in opposition thereto, and due deliberation having been had, it is

Ordered that the said application be and the same is in all things denied.

E. HENRY LACOMBE, *U. S. C. J.*

(Endorsed:) U. S. circuit court, southern district of N. Y.—United States of America *vs.* George W. Beavers.—Order denying writ of *habeas corpus* and certiorari.—Morgan & Seabury, attorneys for defendant, No. 290 Broadway, New York, N. Y.—U. S. circuit court, southern district of New York, Filed Nov. 11, 1903, John A. Shields, clerk.

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United States Supreme Court.

United States *vs.* George W. Beavers.	}	Bond on Appeal.
United States of America, *Southern District of New York.*	}	

Be it remembered that on the 11th day of November, 1903, before me, George C. Holt, one of the judges of the district court of the United States, southern district of New York, personally came, George W. Beavers, as principal and James R. Brown as surety and severally acknowledged themselves to owe to the United States of America, that is to say: the said George W. Beavers, the sum of five thousand dollars, and the said James R. Brown, the sum of five thousand dollars, separately to be levied and made on their respective goods, chattels, lands and tenements to the said United States, if default shall be made in the condition following, to wit:

Whereas the said George W. Beavers was detained in the custody of William Henkel, as United States marshal for the southern district of New York under commitment and warrant of removal to the eastern district of New York, granted by Hon. George C. Holt, judge of the United States district court for the southern district of New York on the 10th day of November, 1903;

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Whereas the said George W. Beavers made an application to the United States circuit court, before Hon. E. Henry Lacombe, circuit judge on the 10th day of November, 1903, for a writ of *habeas corpus*, directed to said William Henkel United States marshal in and for the southern district of New York, requiring said marshal to bring and have George W. Beavers, before said court, together with the true cause of his detention, and;

Whereas, the said George W. Beavers made an application to the United States circuit court before Hon. E. Henry Lacombe, on the 10th day of November, 1903, for a writ of certiorari, directed to Hon. Samuel M. Hitchcock, United States commissioner, and to Thomas Alexander, clerk of the United States district court for the southern district of New York in aid thereof, commanding that they return all proceedings against your petitioner to the circuit court forthwith, for such action as might be proper in the premises, and

Whereas on the 11th day of November, 1903, the said Hon. E. Henry Lacombe, United States circuit court judge did make his final order denying said application for a writ of *habeas corpus* and,

Whereas, the said George W. Beavers has appealed from said final order to the Supreme Court of the United States, and

Whereas, the said Hon. E. Henry Lacombe, United States circuit judge did thereupon allow such appeal and

ordered that pending such appeal, the custody of said George W. Beavers should not be disturbed and I having ordered that the said George W. Beavers be enlarged upon bail in the sum of five thousand dollars, for his appearance to answer the exigency and determination of said appeal and to personally abide the final decision and determination of the said Supreme Court of the United States in that behalf.

Now, therefore, the condition of this obligation is such that if the said George W. Beavers shall duly, personally appear in the United States circuit court for the southern district of New York to answer the exigency and determination of said appeal and personally abide the final decision and determination of the said Supreme Court of the United States, and of said circuit court of the United States, upon the mandate of the said Supreme Court of the United States and obey and abide the orders of said circuit court of the United States, and not depart without leave upon the conditions aforesaid, and upon the entry of said orders upon said appeal, then this recognizance to be void, otherwise to remain in full force and virtue.

GEORGE W. BEAVERS. [SEAL.]
JAMES R. BROWN. [SEAL.]

Taken and acknowledged before me the day and year first above written.

GEO. C. HOLT, *J.*

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SOUTHERN DISTRICT OF NEW YORK, *ss:*

James R. Brown, of Audubon Park in the city of New York, being duly sworn, says that he is worth the sum of ten thousand dollars, over and above all his just debts and liabilities.

JAMES R. BROWN.

Sworn to before me this 11th day of November, 1903.

GEO. C. HOLT, *J.*

Recognizance approved as to form and sufficiency.

GEO. C. HOLT,
United States District Judge.

(Endorsed:) United States circuit court.—George W. Beavers, appellant, *vs.* William Henkel, *et al.*—Bond pending appeal.—Morgan & Seabury, attorneys for appellant, No. 290 Broadway, New York, N. Y.—U. S. circuit court, southern district of New York, Filed Nov. 11, 1903, John A. Shields, clerk.

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Notice of Appeal.

Circuit Court of the United States for the
Southern District of New York.

In the Matter of the Petition of George W. Beavers for the Writs of *Habeas Corpus* and Certiorari.

George W. Beavers, Appellant,

against

William Henkel, United States Marshal in and for the Southern District of New York; Thomas Alexander, Clerk of the District Court of the United States, Southern District of New York; Samuel M. Hitchcock, United States Commissioner for the Southern District of New York, Appellees.

Sirs: Please take notice that George W. Beavers, the petitioner above named hereby appeals to the Supreme Court of the United States *for* the final order made and entered on the 11th day of November, 1903, denying his application for writs of *habeas corpus* and certiorari; and from each and every part of said order.

Dated at the city of New York, on the 11th day of November, 1903.

Yours, &c., MORGAN & SEABURY,
Attorneys and Counselors for Petitioner,
290 Broadway, Manhattan, New York City.

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To Hon. Henry L. Burnett, United States district attorney in and for the southern district of New York.

To William Henkel, Esq., United States marshal in and for the Southern district of New York;

To Thomas Alexander, Esq., clerk of the district court of the United States, in and for the southern district of New York;

To Samuel M. Hitchcock, Esq., United States commissioner in and for the southern district of New York.

(Endorsed:) U. S. circuit court, southern district of N. Y.—Geo. W. Beavers, appellant, *vs.* William Henkel, etc. *et al.*—Notice of appeal.—Morgan & Seabury, attorneys for defendant, No. 290 Broadway, New York, N. Y.—A copy of the within paper has been this day received at this office. Nov. 11, 1903, Henry L. Burnett, U.S. attorney.—I hereby admit service of the within notice of appeal. Nov. 12, 1903. Wm. Henkel, U. S. marshal, S. D. N. Y.—U. S. circuit court, southern district of New York, Filed Nov. 12, 1903, John A. Shields, clerk.

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Petition of Appeal.

Circuit Court of the United States,
Southern District of New York.

In the Matter of the Petition of George W. Beavers for a Writ of *Habeas Corpus* and Certiorari.

George W. Beavers, Appellant,

against

William Henkel, United States Marshal in and for the Southern District of New York; Samuel M. Hitchcock, U. S. Commissioner for Southern District of New York; Thomas Alexander, Clerk of U. S. District Court for Southern District of New York, Appellees.

The petition of the above named petitioner, George W. Beavers, for an order allowing an appeal to the Supreme Court of the United States from the final order hereinbefore entered in this case.

George W. Beavers, the petitioner and appellant above named, feeling himself aggrieved by the final order heretofore made and entered by this court in this case on the 11th day of November, 1903, whereby it was ordered that his application for a writ of *habeas corpus* directed to William Henkel, United States marshal in and for the southern district of New York, requiring the said marshal to bring and have your petitioner before this court and that his application for a writ of certiorari directed to Hon. Samuel M. Hitchcock, United States commissioner for the

southern district of New York and to Thomas Alexander, clerk of the district court for the southern district of New York, commanding them to return all proceedings against your petitioner to the circuit court of the United States forthwith for such action as might be proper in the premises be and the same are hereby denied;

Now comes by Morgan & Seabury, his solicitors and counsel, and petitions this court for an order allowing your said petitioner to prosecute an appeal from said final order to the Supreme Court of the United States under and according to the laws of the United States in that behalf made.

Your petitioner is advised by counsel that there are grave doubts as to whether the proceedings referred to in the petition (a partial copy of the minutes of which is attached to the petition for the writs and marked Exhibit 6), have not infringed the constitutional rights of your petitioner and that the commitment of your said petitioner and the restraint of his person referred to in said petition is without authority of law and that the said United States commissioner before whom your said petitioner was arraigned as set forth in the said petition above referred to had no jurisdiction either to require bail of your said petitioner or to commit your said petitioner in default thereof, and that your petitioner desires in good faith to submit the constitutional questions and other questions involved, to the Supreme Court for their determination.

Your petitioner will ever pray.

MORGAN & SEABURY,
Attorneys for Petitioner, 290 *Broadway,*
Manhattan, New York City.

UNITED STATES OF AMERICA,
Southern District of New York, } *ss:*

George W. Beavers, being duly sworn says that he is the petitioner above named; that the foregoing petition is true to his own knowledge except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

GEORGE W. BEAVERS.

Sworn to before me this 11th day of Nov. 1903.

[SEAL.] S. D. EDICK,
Notary Public, Rockland Co.

Certificate filed in New York Co.

The foregoing petition on appeal is granted and it is ordered that the custody of the prisoner pending appeal shall not be disturbed. Supersedeas bond fixed at $250.

Done in open court this 11th day of Nov. 1903.

E. H. LACOMBE,
Circuit Court Judge.

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(Endorsed:) U. S. circuit court, southern district of N. Y.—George W. Beavers, *vs.* William Henkel, U. S. marshal, &c. *et al.*—Petition of appeal—Morgan & Seabury, attorneys for appellant, No. 290 Broadway, New York, N. Y.—A copy of the within paper has been this day received at this office. Nov. 11, 1903, Henry L. Burnett U. S. attorney.—U. S. circuit court, southern district of New York, Filed Nov. 11, 1903, John A. Shields, clerk.

Assignment of Errors.

In the Supreme Court of the United States.

In the Matter of the Petition of George W. Beavers for Writs of *Habeas Corpus* and Certiorari.

George W. Beavers, Appellant,

against

William Henkel, U. S. Marshal in and for Southern Dist. of New York; Thomas Alexander, Clerk of District Court of U. S. in and for Southern Dist. of New York, and Samuel M. Hitchcock, U. S. Commissioner in and for Southern District of New York, Appellees.

Assignment of errors.

The petition of George W. Beavers, by Morgan & Seabury his counsel, in connection with his petition of appeal to the supreme court in and for the southern district of New York, entered herein on the 11th day of

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November, 1903, denying the writs of *habeas corpus* and certiorari and makes and files the following assignment of errors:

The court erred:

1st. In denying the petitioner's writs of *habeas corpus* and certiorari and remanding him to the custody of the marshal.

2nd. In refusing to grant said writs.

3rd. In refusing to discharge said petitioner.

4th. In holding that the restraint of the petitioner's liberty is legal.

5th. In holding that the restraint of your petitioner is not a violation of his substantial rights.

6th. In holding that said alleged indictment stated an offence against the laws of the United States.

7th. In holding that said alleged indictment was properly admitted in evidence before the honorable commissioner; in proof of probable cause.

8th. In holding that there was sufficient evidence of probable cause.

9th. In holding that the warrant of removal made by the United States district judge for the southern district of New York, was issued upon the finding of probable cause.

10th. In holding that there was no reversible error in the commissioner's admission and exclusion of testimony on the hearing.

11th. In holding that your petitioner was not then and there entitled to be discharged from the custody of the marshal.

12. In holding that the said commissioner at the time of the arraignment of your said petitioner before him, or at any other time, had any jurisdiction, right or authority to require bail of your petitioner or to commit your said petitioner in default of such bail.

13th. In holding that the commissioner properly refused to compel the production of documents required by the defense.

14th. In holding that your petitioner was in custody of the said William Henkel, United States marshal in and for the southern district of New York and deprived of his liberty by him by due process of law.

15th. For other errors appearing on the record, by reason whereof the petitioner prays that the said order dismissing the said writ of *habeas corpus* be refused and that your petitioner be discharged from custody.

GEORGE W. BEAVERS,
By MORGAN & SEABURY,
His Att'ys & Counsellors.

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MORGAN & SEABURY,
Counsel for Petitioner, 290 *Broadway,*
Borough of Manhattan, New York City.

(Endorsed:) U. S. circuit court, southern district of N. Y.—George W. Beavers *vs.* William Henkel, U. S. marshal, etc. *et al.*—Assignment of errors.—Morgan & Seabury, attorneys for app'l't No. 290 Broadway, New York, N. Y.—A copy of the within paper has been, this day received at this office. Nov. 11, 1903, Henry L. Burnett, U. S. attorney.—U. S. circuit court, southern district of New York, Filed Nov. 11, 1903, John A. Shields, clerk.

Supreme Court of the United States.

In the Matter of the Petition of George W. Beavers for Writs of *Habeas Corpus* and Certiorari.

George W. Beavers, Appellant,
vs.
William Henkel, U. S. Marshal in and for the Southern District of New York, Appellee.

Know all men by these presents, that we, George W. Beavers as principal, and Max D. Steuer and James R. Brown, as sureties, are held and firmly bound unto the United States of America in the full and just sum of two hundred and fifty dollars ($250) to be paid to the United States to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

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Sealed with our seals and dated this 11th day of November, 1903.

Whereas lately, to wit, on this 11th day of November, 1903, at a circuit court of the United States in and for the southern district of New York, in a proceeding therein pending an order was entered denying the application of the above named petitioner for a writ of *habeas corpus* and certiorari,

And the said petitioners having duly obtained an appeal from the said order to the Supreme Court of the United States and filed a copy thereof in the clerk's office of the said circuit court to review the same;

Now, the condition of the above obligation is such that if the said petitioner George W. Beavers shall prosecute said appeal to effect and shall answer all costs if *they* shall fail to make the said appeal good, then this obligation to be void, else to remain in full force and effect.

GEORGE W. BEAVERS. [SEAL.]
MAX D. STEUER. [SEAL.]
JAMES R. BROWN. [SEAL.]

Sealed and delivered and taken and acknowledged this 11th day of November, 1903, before me.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

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UNITED STATES OF AMERICA,
Southern District of New York, } *ss:*

Max D. Steuer and James R. Brown, each being duly sworn, for himself says, that he is worth more than the sum of five hundred dollars over and above all his just debts and liabilities.

MAX D. STEUER.
JAMES R. BROWN.

Sworn to before me this 11th day of November, 1903.

[SEAL.] JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

Approved as to form, amount and sufficiency.

E. HENRY LACOMBE,
U. S. Circuit Judge.

(Endorsed:) U. S. circuit court, southern district of New York. Filed Nov. 11, 1903, John A. Shields, clerk.

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Citation on Appeal.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Hon. Henry L. Burnett, United States district attorney for the southern district of New York; John A. Shields, Esq., clerk of the United States circuit court for the southern district of New York; William Henkel, Esq., United States marshal in and for the southern district of New York; Samuel M. Hitchcock, Esq., United States commissioner for the so. dist. of Now York; Thomas Alexander, Esq., clerk of U. S. district court, so. dist. of New York:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at the city of Washington within thirty days from the date of this writ, pursuant to an appeal duly allowed by the circuit court for the southern district of New York, and filed in the clerk's office of said court on the 11th day of November, A. D. 1903; in a cause entitled. In the matter of the petition of George W. Beavers, for writs of *habeas corpus* and certiorari, George W. Beavers, appellant against William Henkel, United States marshal in and for the southern district of New York, Samuel M. Hitchcock, U. S. commissioner in and for southern district of New York and Thomas Alexander, clerk of the district court of the United States in southern district of New York, appellees, to show cause, if any why the final order of the said circuit court rendered against the said appellant as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

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Witness the Honorable E. Henry Lacombe, judge of the circuit court of the United States, this 11th day of November, A. D. 1903.

E. HENRY LACOMBE,
Justice of the Circuit Court of the United States.

(Endorsed:) U. S. circuit court, southern dist. of N. Y.—George W. Beavers, appellant, *vs.* William Henkel *et al.*—Citation on appeal. Morgan & Seabury, attorneys for defendant, No. 290 Broadway, New York, N. Y.—A copy of the within paper has been this day received at this office. Nov. 11, 1903, Henry L. Burnett, U. S. att'y.—U. S. circuit court, southern district of New York, Filed Nov. 11, 1903, John A. Shields, clerk.

UNITED STATES OF AMERICA,
Southern District of New York, } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to 206, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the cause entitled In the matter of the petition of George W. Beavers for a writ of *habeas corpus* and certiorari, George W. Beavers, appellant, against William Henkel, United States marshal in and for the southern district of New York, and others, appellees, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 23rd day of December, in the year of our Lord one thousand nine hundred and three, and of the Independence of the said United States the one hundred and twenty-eighth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, *Clerk.*

[Endorsed:] United States Supreme Court. George W. Beavers, appellant, *vs.* William Henkel, U. S. marshal, S. D. of N. Y., and others, appellees. Transcript of record from the circuit court of the United States for the southern district of New York.

Endorsed on cover: File No. 19,186. S. New York C. C. U. S. Term No. 535. George W. Beavers, appellant, *vs.* William Henkel, United States marshal in & for the southern district of New York. Filed January 4", 1904. File No. 19,186.

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In the Supreme Court of the United States.

October Term, 1903.

George W. Beavers, appellant,
v.
William Henkel, United States marshal, southern district of New York. } No. 535.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE.

The appellant was indicted on July 22, 1903, in the circuit court of the United States for the eastern district of New York, for having, on July 25, 1900, received compensation, that is to say a check for $8.10 (said Beavers being then and there an officer in the employ of the United States), from the Edward J. Brandt-Dent Company in payment for his services in procuring a contract with the United States for the purchase of 250 Brandt automatic cashiers, in violation of section 1781 of the Revised Statutes. Upon a warrant issued by Samuel H. Hitchcock, United States commissioner in the southern district of New York, the defendant was arrested in New York City in that district. He sued out a writ of habeas corpus to

test the right to remove him to the eastern district of New York for trial on said indictment, claiming that the process on which he was held was void, and that he was restrained of his liberty in violation of the Constitution of the United States. On hearing the writ was discharged, the appellant admitted to bail in the sum of $5,000, and this appeal taken.

As the case is one of several prosecutions that are known as the Post-Office frauds, and of general public interest, and in order that a prompt trial on the merits may be had, if possible, the Solicitor-General, on behalf of the United States, moves the court, under rule 26, section 3, to advance the case on the docket for hearing during the present term.

If agreeable to the court, the Solicitor-General suggests that the case be set down for hearing early in March next.

Notice of this motion has been served upon counsel for the appellant.

Henry M. Hoyt,
Solicitor-General.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 535.

GEORGE W. BEAVERS, APPELLANT,

vs.

WILLIAM HENKEL, UNITED STATES MARSHAL IN, AND FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from a final order of the circuit court of the United States for the southern district of New York, dated November 11, 1903, which denies the appellant's petition for writs of *habeas corpus* and *certiorari* (fols. 188 to 190).

On November 10, 1903, the appellant presented a petition (fols. 1 to 7) to the circuit court of the United

States for the southern district of New York, setting forth that he was a citizen of the United States; that he was then and there imprisoned and restrained of his liberty by one William Henkel, marshal of the United States for the southern district of New York, not by virtue of any decree or final order of a court of the United States or other competent tribunal, but under color of authority of the United States, by virtue of section 1014 of the Revised Statutes thereof, evidenced by a warrant of removal dated November 10, 1903, and signed by the Hon. George C. Holt, a judge of the district court of the United States for the southern district of New York; that the restraint of the petitioner was without due process of law; that the alleged process under which he was held was wholly void and of no force nor effect; and that the said restraint was illegal and in violation of the rights secured and guaranteed to him under the Constitution of the United States of America.

Annexed to the petition and made a part thereof were the following exhibits:

1. The warrant of removal (fols. 7 to 10).

2. The commissioner's warrant to apprehend and to commit (fols. 10 to 15).

3. Complaint on removal (fols. 15 to 20).

4. Bench warrant, with certification by clerk (lols. 20 to 23).

5. Indictment found in the eastern district of New York, with certification by clerk (fols. 23 to 37).

6. Testimony taken before the commissioner, with exhibits offered in evidence, duly certified (fols. 37 to 180).

The record shows that there was filed in the circuit court for the eastern district of New York, on July 23, 1903, an indictment (fol. 31) charging the appellant, George W. Beavers, with violations of section 1781 of the United States Revised Statutes, and that on August 14, 1903, the clerk of the court issued a bench warrant for the apprehension of the accused if found within the eastern district of New York (fols. 20 to 22). Subsequently and on September 3,1903, the accused not being found within the eastern district of New York, one Frank E. Little verified a complaint on removal before Samuel M. Hitchcock, commissioner of the United States for the southern district of New York (fol. 19), who thereupon issued a warrant (fols. 10 to 12) to the marshal of the United States for the southern district of New York, directing him or his deputy to apprehend the said George W. Beavers, and to bring him forthwith before the said commissioner, there to be dealt with according to law.

On September 8, 1903, the accused was apprehended by the marshal, arraigned before the commissioner (fols. 12 to 13), and admitted to bail for his appearance from time to time before the commissioner, the accused when arraigned having demanded an examination (fol. 12), as was his right to do under section 1014 of the United States Revised Statutes. On September 15, 1903, the examination of the accused began. The identity of the accused was established (fols. 38 to 40). The prosecution offered in evidence a paper purporting to be a certified copy of the

indictment, in question (fol. 42), which was received by the commissioner over the objection of the accused (fa's. 42 to 45), and rested (fol. 45).

After the defense had duly moved to dismiss the complaint (fol. 45) and the commissioner had denied the motion, the defense duly excepted to the ruling (fol. 64) and demanded that the prosecution announce the names of the witnesses that appeared before the grand jury which found the indictment.

This the prosecution declined to do, and upon the refusal of the commissioner to so instruct the prosecution the defense duly excepted (fol. 64). The witnesses, Edmund H. Driggs, George F. Miller, Harry F. Burns, Amy Wren, William J. Youngs, Frank E. Little, and John F. Oldfield, were all finally produced by the defendant before the commissioner, and demand was duly made by the defense upon the prosecution to call and examine the witness Driggs (fol. 127), and the declination of the prosecution to comply with this demand applied not only to the witness Driggs, but to all the witnesses called (fol. 127). The witness Driggs was one of the persons from whom it was alleged in the indictment the appellant had improperly received money (fol. 80). It was also alleged in the indictment that the appellant had unlawfully received money from the witness George F. Miller (fol. 30). It appeared from the testimony of the witness Little (fol. 40) that he was the complaining witness, and was one of the Post-Office inspectors who had been assigned to investigate the actions of the accused. The testimony of the witness Oldfield likewise disclosed the fact that he,

too, was a Post-Office inspector who had been assigned to work with the witness Little in the investigation to which reference has been made (fol. 163).

It was shown by the testimony of the witnesses Driggs (fol. 125), Burns (fol. 128), Wren (fol. 137), and Oldfield (fol. 174) that each had been in attendance upon the grand jury for the eastern district of New York which found the indictment which was made the basis of the removal proceeding. It was shown by the testimony of George F. Miller (fol. 128) that he was not before the grand jury which found the indictment in question, and by the testimony of Frank E. Little (fols. 150 to 161) that be had no personal knowledge of any of the facts alleged. But, in spite of the fact that the witnesses on whose testimony the indictment is presumed to have been found were produced before the commissioner and ample opportunity afforded to examine these witnesses, the prosecution refused to take advantage of the opportunity thus afforded to adduce before the commissioner primary evidence (if any there was) of the facts alleged in the indictment, preferring to rest its entire case upon the unsupported certified copy of the indictment.

The accused attempted to elicit from these witnesses testimony showing that they gave no evid9nce before the grand jury, or that such as they did give was incompetent and not sufficient on which to find an indictment, and to offer to the commissioner primary evidence in reference to the charge contained in the indictment, and. further to controvert all the material facts alleged in the indictment. None of this evidence was presented because objections

by the prosecution to its introduction were sustained by the commissioner (fols. 125, 126, 128,137-147,149, 152-155).

On November 2, 1903, upon the termination of the examination of the witness Oldfield, the commissioner at once committed the accused to the custody of the marshal (fol. 180) to await the order of removal of the district judge.

The argument on the prosecution's application for a warrant of removal having been set for November 10, 1903, the district judge on this day, after hearing counsel for the accused, but without having before him the record of the proceedings had before the commissioner, ordered the removal of the accused to the eastern district of New York forthwith. After the district judge had granted the application for removal and while the appellant was in the actual custody of the marshal (fol. 9), the accused applied to the circuit court for writs of *habeas corpus* and *certiorari*, which application was denied on the 11th day of November, 1903, and this appeal was thereupon taken.

All points to be discussed upon this appeal relate to the jurisdiction of the commissioner to apprehend and to commit, and of the district judge to order the removal of the accused.

The contention of the appellant is that the certified copy of the indictment received by the commissioner as the sole evidence to sustain his finding of probable cause was not to be regarded as any evidence at all of the facts therein alleged, or as possessing any probative force; that the complaint on removal was jurisdictionally defective;

and that it was competent for the appellant to controvert the allegations of the indictment by the sworn averments in his petition for the writ of *habeas corpus* in respect of those facts, the existence of which was necessary to give the commissioner jurisdiction. The errors duly assigned and now asserted and relied upon by the appellant are as follows (fols. 199-201):

The court erred:

In denying the petitioner's writs of *habeas corpus* and *certiorari* and remanding him to the custody of the marshal.

In holding that said alleged indictment was properly admitted in evidence before the honorable commissioner, in proof of probable cause.

In holding that there was sufficient evidence of probable cause.

In holding that the warrant of removal made by the United States district judge for the southern district of New York was issued upon the finding of probable cause.

In holding that your petitioner was, not then and there entitled to be discharged from the custody of the marshal.

In holding that the said commissioner at the time of the arraignment of your said Petitioner before him, or at any other time, had any jurisdiction, right, or authority to require bail of your petitioner, or to commit your said petitioner in default of such bail.

Appendix D

In holding that your petitioner was in custody of the said William Henkel, United States marshal in and for the southern district of New York, and deprived of his liberty by him by due process of law.

ARGUMENT.

I.

The controlling questions to be discussed on this appeal are whether the indictment offered in evidence before the commissioner can be regarded as conclusive evidence against the accused of the facts therein alleged; whether it was competent at all as evidence of such facts, and whether such indictment was entitled to be accorded any probative force whatever.

When the defendant was arraigned it was the duty of the commissioner to inquire as to the identity of the accused, whether a crime had been committed, and whether there was probable cause to believe the defendant guilty of the crime charged.

Section 1014 of the United States Revised Statutes, under which these removal proceedings were instituted, provides as follows:

"For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a

city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."

This section establishes the practice of the State where the examination is held as the practice in conformity to which the examination must be conducted. Proceedings instituted under section 1014 are in all respects similar to criminal proceedings instituted before a committing magistrate in the State where the arrest is made and should be governed and controlled by the rules of procedure in force in the State where the arrest is made, and the same rules of evidence applied. This is perfectly clear, both *from the language of the section and from the decisions of the courts construing its meaning.

Thus Judge Brown in the Dana case said:

"Although the State rules of evidence are not applicable in criminal proceedings in Federal cases, unless

Congress has so provided, the above clause of section 1014 sufficiently shows the intent of Congress in this instance. It also imports that the rules of procedure to be followed in proceedings under section 1014 are those in force in the State and at the time and place of the removal proceeding."

Re Dana, 68 Fed., 886, p. 893.

This has been established by a long line of well-considered cases (U.S. *vs.* Rundlett, 2 Curt., 42 ; U, S. *vs.* Case, 8 Blatchf., 251; U.S. *vs.* Horton, 2 Dill., 94; U.S. *vs.* Brawner, 7 Fed., 86, 90; U.S. *vs.* Martin, 17 Fed., 150, 158; Re Burkhardt, 33 Fed., 25, 26; U.S. *vs.* Greene, 100 Fed., 941).

In U.S. *vs.* Rundlett (*supra*) Judge Curtis regarded the words of the 33d section of the judiciary act "agreeably to the usual mode of process against offenders in such Slate" as synonymous with mode of proceeding, and stated it as his opinion that it was the intention of Congress by these words "to assimilate all the proceedings for holding accused persons to answer before a court of the United States, to the proceedings for similar purposes by the laws of the State where the proceedings should take place" (2 Curt., 44).

Judge Woodruff, of the northern district of New York, approved Judge Curtis' opinion in the Rundlett case and said that it was quite clear that he had correctly construed the 33d section of the judiciary aet (U.S. *vs.* Case, 8 Blatchf., 250, 251).

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In U.S. *vs.* Horton, 2 Dill., 94, 97, Circuit Judge Dillon took occasion to say;

"Congress has not seen fit to prescribe a uniform mode of its own in respect to preliminary proceedings against persons accused of a violation of its criminal enactments, but in the 33d section of the judiciary act it provided that the procedure in such cases be agreeably to the usual mode of process against offenders in such State "—

that is, in the State in which the offenders may be arrested and the proceedings had.

In U.S. *vs.* Brawner, 7 Fed., 86, 90, the learned district judge held that it seemed to be the plain requirement of the statute (sec. 1014) that the State practice of preliminary examinations should prevail.

In U.S. *vs.* Martin, 17 Fed., 150, 151, it was said:

"A commissioner acting under the statute is simply a committing magistrate. The ambiguous phrase 'mode of process' is interpreted to mean 'mode of proceeding' and this proceeding is according to the law of the State in similar cases. The validity of the process and order in question must then be determined by reference to the law of Oregon for the arrest, examination and commitment of persons charged with the commission of crime against the laws of the State."

Judge Brown reiterated the views expressed by himself in the Dana case, in the case of United States *vs.* Greene (*supra*), where he said (100 Fed., p. 943):

"In that decision it was pointed out that the proceeding for commitment and removal under section 1014 is an original proceeding, to be conducted according to the laws of the State in similar proceedings before committing magistrates; that the object of the proceeding is to enable the commissioner to ascertain for himself whether front the proof of facts and circumstances produced before him, there is probable cause to believe the defendants guilty of the offense charged."

Decisions to the same effect could be multiplied and cited at length, but the proposition is now so well sustained by authority that it must be deemed to be conclusively established.

it being established that the State practice should be followed in these proceedings, reference must be made to the practice existing in the State of New York.

The provisions of the New York Code of Criminal Procedure relating to preliminary examinations of accused persons begin with section 188.

This section provides that when the defendant is brought before a magistrate upon an arrest, on a charge of having committed a crime, the magistrate must immediately inform him of the charge against him and of his right to the aid of counsel in every stage of the proceedings and before any further proceedings are had.

Section 194 provides that—

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"At the examination the magistrate must in the first place read to the defendant the depositions of the witnesses examined on the taking of the information and if the defendant requests it or elects to have the examination must summon for cross-examination the *witnesses so examined, if they be within the county.* He must also issue subpoenas for additional witnesses required by the prosecutor or defendant."

"The witnesses must be examined in the presence of the defendant and may be cross-examined in his behalf."

Section 195.

"Alter the waiver of the defendant to make a statement or after he has made it, his witnesses if he produce any, must be sworn and examined."

Section 201.

"After hearing the proofs, and the statement of the defendant if he have made one, if it appear, either that no crime has been committed, or that there is not sufficient cause to believe the defendant guilty thereof, the magistrate must order the defendant to be discharged." * * *

Section 207.

Express authority to issue *subpoenas duces tecum*, is conferred upon committing magistrates by section 613.

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It is clear from the provisions of the State code quoted that it is the duty of the committing magistrate to determine for *himself* whether or not a crime has been committed, and whether, from the evidence adduced before him, there is sufficient cause to believe the defendant guilty thereof.

The history and growth of these provisions are dealt with by Judge Brown *In re Dana*, 68 Fed., 886-894, where he says:

"At common law a magistrate could not lawfully commit except upon oath. When the witnesses were brought before him, he was required to take their depositions as to the facts and circumstances within their knowledge showing criminality; the defendant had long acquired the right to cross-examine the complainant's witnesses and to produce witnesses on his own behalf; and on the facts thus ascertained, the magistrate was to determine the question of probable cause (1 Chit. Cr. Law, 33, 34, 78, 79; 1 Tayl. Ev., Sec. 484, note 2). Provisions to this effect were early incorporated in the statutes of Nev York, were re-enacted in the Revised Statutes (2 Rev. St., 706). and are all stated in fuller detail in the existing Code of Criminal Procedure, adopted in 1881 (Laws 1881, c. 442; Code of Criminal Procedure, sections 148-150,1.94, 207, 208). If a magistrate commits upon oath of belief or suspicion only, without any statement of facts and circumstances showing probable guilt, he is liable to an 'action for false imprisonment (1 Chit. Cr. Law, 34; Blodgett *vs.* Race, 10 Han., 132; see *In re Rothaker*, 11. Abb. N. C., 122)."

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Judge Brown, in commenting upon the unexplainable rulings of the commissioner in the Greene case, by which he rejected practically all the evidence offered by the accused, said (page 943):

"Precisely opposite was the ruling of this court in the Dana case, where it was shown, as I have said, that by section 1014 (the sole authority in the Federal courts for commitment or removal in such cases) the proceeding before commissioners must be in conformity with the existing State procedure. * * *

"In States, therefore, where the accused has no right to examine witnesses in his own behalf before a committing magistrate, he cannot do so in proceedings under section 1014; but in other States, as in New York, where this right does exist and is in daily practice it cannot be lawfully denied him. In New York the right of the accused to produce witnesses in his own behalf before committing magistrates was confirmed by express statute more than 70 years ago and more than 40 years before the re-enactment of section 1014 of the United States Revised Statutes; and such is the uniform course of procedure. * * * This practice is ancient" (Dalt. Just. (1742), c., 165; 1 Chit. Cr. Law, 79.)

"The existence of an indictment in another jurisdiction has no bearing upon the application of this statute to proceedings for commitment or to the course of the examination, when an examination is demanded pursuant to the statute, nor upon the commissioner's duty to take whatever competent evidence is offered by the defendant

tending to show the want of probable cause and for that purpose and to that extent, the proceeding is of necessity, like the proceedings before the State magistrates, *a partial preliminary hearing on the merits.* * * * In proceedings under that section therefore, the commissioner must receive all evidence touching probable cause of guilt, that a State committing magistrate would be bound to take without reference to any subsequent trial upon indictment.

"The objection that this would be trying the issue' is premature. There is no ' issue ' as respects the indictment until the defendants are committed, removed, and arraigned, and plead not guilty. The inquiry before the commissioner is for the very purpose of ascertaining whether there is sufficient ground to commit and remove the accused and oblige him to plead and stand trial, and to enable him under the State statute to arrest the proceedings in limine, if he can, by proving that there is no probable cause for the accusation. That was the only 'issue' before the commissioner on this hearing. In New York the statute above cited has been followed in. the Code of Criminal Procedure by still further provisions designed to safeguard accused persons from arbitrary, mistaken, or malicious commitments" (sections 188-214).

"And in the absence of some act of Congress expressly dispensing with any other evidence than the indictment itself, as in extradition proceedings, it is impossible that in a proceeding under section 1014, which makes applicable the State laws, the rights of citizens expressly guarded by the State laws can be set aside by a mere indictment in a distant jurisdiction; so that without a word in their

own defense citizens could be thereupon transported for trial hundreds or even thousands of miles away from their homes in contravention of the act of Congress and the laws of the State, which it recognizes and adopts. Such a proceeding would be not merely erroneous but illegal."

The most casual inspection of the transcript of record now before the court will show how wide was the departure from these rules upon the so-called preliminary hearing accorded the appellant.

The defendant having been arraigned, the Government after establishing his identity offered in evidence a certified copy of an indictment found against him in the eastern district of New York, which was not indorsed with the name of any witnesses. This was all the "evidence" presented against the defendant, and it was upon this alone that the commissioner found that a crime had been committed, and that probable cause existed for believing the defendant guilty of the crime charged.

The contention which the appellant now urges is that the indictment was not evidence and was incompetent and inadmissible as such and had no probative force whatever, and since under the provisions of the New York Code of Criminal Procedure relating to the preliminary examination of accused persons (quoted supra) the appellant was entitled to have the witnesses that were within the county examined in his presence and produced for cross-examination, and since it appears from the record that the witnesses Little, Oldfield, Driggs, Miller, and Harry F. Burns were all within the county, were

actually present before the commissioner, and that demand was duly made on behalf of the appellant that the prosecution examine these witnesses in the presence of the accused and submit them for cross-examination, and as it likewise appears that the prosecution refused to examine the said witnesses, and that the commissioner refused to direct the prosecution to examine them, to all of which exception was taken, it follows, therefore, that the defendant was deprived of his liberty without due process of law, that he was and is held without lawful warrant, contrary to the Constitution of the United States, and that the several orders that were made respecting his custody, which, were all based upon this proceeding, were absolutely without jurisdiction and void.

An indictment is defined by Blackstone as "a written accusation of one or more persons of a crime or misdemeanor, preferred to and presented upon oath by a grand jury" (4 Bl. Corn., 302).

An indictment is not evidence or proof of the facts stated in it. It is a mere pleading containing the charge or accusation to which a defendant must make answer. To consider it as evidence of the truth of the allegations contained in it is to substitute accusation for proof. To regard an indictment not indorsed with the names of witnesses as competent evidence of the facts alleged in it, is to abrogate the rule requiring a magistrate or commissioner to take proof that a crime has been committed and. of the existence of probable cause to believe the accused guilty. When one is charged with an offense his guilt cannot be demonstrated by re-accusation.

A charge cannot be held to be evidence of guilt. A charge or accusation cannot be made proof or evidence of the facts stated in it by calling it evidence. However it may be characterized or whatever it may be called, it is nevertheless a mere pleading containing an accusation. To permit such an accusation, when it is not indorsed with the names of the witnesses who appeared before the grand jury, to be considered as evidence which justifies the removal of a citizen from one Federal district to another, is absolutely to destroy the liberty of the citizen. A citizen ought not to be subject to removal from one end of this country to another merely because an indictment has been found against him. To separate a man from his home, his business interests, and remove him to a distant State simply because someone, whose name he is not even permitted to know, has accused him of a crime is repugnant to the principles of justice. This is the principle involved in this case. If a man can be removed from one district to another district in the same State merely upon an indictment unindorsed with the names of the witnesses who appeared before the grand jury, it follows that he can be removed to a district in a distant State. *Section* 1014 *of the United States Revised Statutes provides for the procedure to be followed upon removal, not from one State to another, but from one district to another.*

The principle for which the Government is contending in this case is that a citizen can be removed to a distant State upon a mere accusation being made against him in the State to which removal is sought, without any proof being presented that a crime had been committed, or that there is any evidence at all to believe him guilty, and

without any proof that the accused was in the district when the crime was-committed. This assault upon the liberty of the citizen is to be made without 'even informing the accused. of the name of his accuser.

This court has never had occasion directly to pass upon the question now presented. In the Dana case Judge Brown stated that an indictment which was not indorsed with the names of the witnesses who appeared before the grand jury could not be considered as sufficient evidence to justify the removal of a citizen from one district to another.

In United States *vs.* Greene (100 Fed., 941; 108 Fed., 816) Judge Brown held that an indictment was not conclusive evidence of the facts stated therein, even though indorsed with the names of witnesses, and in Green *vs.* Henkel (183 U.S., 241) no doubt was suggested by this court as to the correctness of these views.

In view of the decisions of Judge Brown and the fact that they were generally recognized as expressing correctly the existing law on this subject, an attempt was made to have Congress amend the law so as to provide that a certified copy of an indictment should of itself be competent and sufficient evidence to justify a removal.

The grand jury of the eastern division of the southern district of Georgia, feeling incensed at the determination of the Gaynor and Greene cases, made in New York, filed a special presentment petitioning Congress to amend section 1014 of the United States Revised Statutes so that the removal might be secured upon the presentation of a

certified copy of an indictment and proof of the identity of the accused.

The text of the proposed amendment which was introduced into Congress is added to this brief in the appendix. The proposed amendment was at the time extensively commented upon and public hearings were had, and after full investigation and discussion Congress refused to make the proposed amendment (*Congressional Record,* April and May, 1900; *NM York Law Journal,* April 28, 1900; *New York Evening Post,* April 24, 1900; *New York Sun,* April 25, 1900, May 4 and 5, 1900; *New York Times,* May 7, 1900).

The effort of the Government in, this case is to effect a change in the law by judicial construction which the legislative branch of the Government deliberately refused to make.

No useful purpose can be served by creating by judicial construction the practice for which the Government contends in this case. The orderly administration of justice will in no way be facilitated by it. On the contrary, both the orderly administration of justice and the protection of the rights of citizens require that evidence establishing the existence of probable cause should be presented before a citizen is subjected to removal into .another district.

The doctrine that a certified copy of an indictment is to be regarded as competent evidence of the facts therein alleged outside the district in which it was found, so as to dispense with further proof of criminality, seems

first to have been announced in 1871 by Judge Lowell in Alexander's case (1 Lowell's Dec., 530). That case arose in Massachusetts, and the only evidence of guilt was a certified copy of an indictment returned to the circuit court of the United States for the district of Louisiana.

Judge Lowell, in holding this enough to authorize the issue of a warrant, said:

"Although it has been usual in England and America to examine witnesses before the committing magistrate in the presence of the accused, yet this has never been an essential prerequisite for holding an accused person for trial. He might always be arrested upon the warrant of a coroner or of a court upon an *ex parte* examination before a coroner's jury or a grand jury. The indictment in the district in which it is found is an *ex parte* proceeding, but since it is found upon oath and after the examination of witnesses it has a presumption of validity. *Before the commissioner it is only a piece of evidence, to be sure, and may be met and controlled, but when it stands by itself and uncontradicted, it seems to be enough, according to our practice, to authorize the warrant.*"

The only point that appears to have been urged by counsel in Alexander's case was that the defendant was, under the Constitution, entitled to be confronted by the witnesses against him on a preliminary hearing. This argument was answered by the indisputable proposition that since the constitutional right to be confronted by witnesses does not arise until trial, unless the right is accorded the accused by a statute of the State where the

preliminary hearing is being conducted, as is the case in the State of New York, an indictment is not objectionable as evidence merely on the ground that it is *ex parte* in character. But the court went further and decided that since an indictment is presumably round on sworn testimony, it must be regarded of itself, standing alone and uncorroborated, *outside the jurisdiction within which it was found*, as a "piece of evidence" of the facts therein alleged, sufficient to rebut the presumption of innocence and justify the removal of the accused.

That this ruling was out of harmony with all settled rules of evidence, was supported by no recognized principle of law, and was founded only on considerations of convenience, was subsequently admitted with amazing frankness by the very judge propounding it in United States *vs.* Pope, 24 U.S. Inter. Rev. Rec., page 29. Commenting there on his own decision in Alexander's case, Judge Lowell remarked:

"The usual course is to produce either witnesses or affidavits in behalf of the United States. It has been seriously doubted whether a copy of an indictment is evidence on such an examination. I decided in Alexander's case that it is. This was a very convenient decision for the United States and a sound one, *but it rests rather on long usage than on any principle of law. Because, generally speaking, an indictment is evidence of nothing but its own existence, unless there is some statute giving it greater effect. It is but secondary evidence after all, or rather a statement of the result of evidence, and the better practice is to give primary evidence of criminality.*"

Such is the view of the judge who propounded the doctrine that a certified copy of' an indictment is to be regarded as a "piece of evidence" of the facts therein alleged outside the jurisdiction in which it was found. No principle of law justifies his decision. Generally speaking, an indictment is evidence of nothing but its own existence. No statute gives it greater effect. It is only the result of evidence. The better practice is to give primary evidence of criminality. Yet in spite of all this, presumably for reasons of " convenience to the United States," it is to be regarded as evidence of the guilt of the party accused.

It is believed that to these two decisions, supported by no stronger reasoning than the foregoing, may be traced the subsequent cases in the Federal Reports, where it has been intimated, generally by way of dicta, that a copy of an indictment, outside the jurisdiction where it is found, is evidence of the truth of the facts therein averred:

(U.S. *vs.* Haskins, 3 Saw., 265; *Ex parte* Clark, 2 Ben., 540; U.S. *vs.* Dana, 68 Fed., 886; U.S. *vs.* Rogers, 23 Fed., 658; U.S. *vs.* Fowkes, 49 Fed., 50; *In re* Buell, 3 Dillon, 120; opinions of Miller and Love, JJ., in 1 Wool. C. C., 423.)

It is, of course, common learning that an indictment. within the jurisdiction' where found, so far supplants the necessity of proof of probable cause, supported by oath or affirmation, as to justify a committing magistrate in holding a person for trial thereon without additional proof of criminality. Such is conceded to be the rule of the common law. It is also conceded common law that a warrant for the apprehension of a fugitive, when "backed"

in the county where it was sought to be executed, might be executed therein without other formalities and the offender summarily conveyed back to any county in the United Kingdom within which the indictment was found or the warrant issued (4 Blackstone Comm., ch. 21, page 292).

A similar practice, permitting the execution of the warrant of a United States judge anywhere within the United States, was contended for in the early history of the Federal judiciary, and was even sustained by an opinion of Attorney General, afterward Mr. Chief Justice Taney (2 Op. Att. Gen., p. 564; 11 id., p. 527). And it may be conceded that it might be competent for Congress to make the bench warrant of a United States judge run into any Federal district, thus obviating the necessity of a hearing before a United States commissioner in the district wherein the accused was found. Or it might be competent for Congress by an express statute to make a certified copy of an indictment competent evidence of the facts therein alleged, as the legislatures of certain States have done, and as Congress has seen fit to do in cases of extradition and interstate rendition (R. S., secs. 5271, 5778; Cal. Cr. Code, sec. 1550).

But the complete answer to both of these propositions is that Congress has adopted neither the one course nor the other. (See opinions of Lacombe, J., in Price's case, 83 Fed., 830, and of Brown, J., in U.S. us. Greene, 100 Fed., 944). Instead, it has, by a statute, dating from the inception of our judicial system, committed to United States commissioners or to district judges sitting as such the determination of the question as to the existence ,of

probable cause to believe the person accused guilty of a crime.

We have the high authority of Mr. Chief Justice Marshall for the statement that such a determination must be made on legal evidence such as a court or jury might hear (*Ex parte* Bollman, 4 Cranch, 75).

It is the contention of this appellant that there is no statute, and no usage, and no principle of law, and no sound reason which demands or warrants the rule that a certified Copy of an indictment is to be regarded as legal evidence of any act whatever, except the single fact that an indictment has been found in the district from which it emanates.

Judge Lowell's decision in Alexander's case was erroneous in failing to appreciate the distinction between the effect of an indictment at common law, as dispensing with any preliminary evidence at all in the district or county wherein it was found, so as to justify holding the accused for trial, and the effect of an indictment itself as legal evidence in another jurisdiction before an officer proceeding under a specific statute. This distinction was pointed out in forcible and appropriate language by Elihu Root, Esq., in his argument in the Dana case, in the course of which he said:

"Undoubtedly the fourth amendment is to be considered in conjunction with the fifth amendment which incorporates the common-law grand jury into the Federal system, and it may well be that within the limits

of efficacy and operation of the common law grand jury, an indictment takes the place of the oath or affirmation required by the fourth amendment. But the grand jury at common law was confined to the particular jurisdiction within which it was created and from which its members were drawn. Its finding had no force or effect whatever beyond the limits of that jurisdiction. An indictment found by such a grand jury was no basis whatever for the issue of a warrant outside of the line of that jurisdiction, and there is no warrant to be found in the Constitution or any principle or any statute or any usage for asserting that the incorporation of the grand jury in the Federal system by the fifth amendment authorizes a departure from the fundamental principle that no warrant shall issue except on probable cause supported by oath or affirmation."

After quoting at length from the opinion of Judge Lowell in United States *vs.* Pope, 24 U.S. Internal Revenue Records, page 29, and in Alexander's case, I Lowell, page 530, and pointing out the fact that the constitutional question involved was not argued before Judge Lowell in these cases, Mr. Root's argument proceeds:

"I submit that the ruling goes too far in the effect which it gives to the indictment; that it does not discriminate between the effect of an indictment in the jurisdiction in which it is found and the effect outside the jurisdiction, and that Judge Lowell ought not to have gone so far as to make it even evidence of any description outside the jurisdiction. When the constitutional prevision which I cite has been applied to the custom on which he relies and

which he frankly says is not sustained by any principle of law, that custom must fail."

In determining the weight to be accorded to this indictment it should be borne in mind that it was found without any preliminary hearing being accorded the accused in the district where the crime is alleged to have been committed. This is not a case where such a preliminary hearing is had before the magistrate and then the defendant flees from the jurisdiction where such hearing was had. In this case the Government preferred the irregular method of securing an indictment before any charge was made before a commissioner to determine whether the defendant should be held to await the action of the grand jury.

In reference to the value of indictments found under such circumstances as evidence, District Judge Butler, in United States *vs.* Fowkes, 49 Fed. Rep., 50, said:

"Here, however, the circumstances are extraordinary. The indictment, as we have seen, was found at the instance of the prosecuting attorney without previous commitment or binding over; and time relator has consequently never had opportunity to know anything of the circumstances out of which the alleged crime is supposed to arise, or the nature of the evidence by which it is to be proved; and it is proposed to transfer him under these circumstances to a distant State for trial, while the undisputed testimony before me seems at least to justify the belief not only that he did not but also that he could not commit the offenses charged in Missouri or indeed elsewhere. In

view of the circumstances under which the indictment was found, I do not regard it as entitled to any greater weight than a magistrate's commitment after hearing. I doubt whether it is entitled to as much. The practice pursued in obtaining indictments, where there has been no commitment or binding over (which is so well understood that I must take judicial notice of it) is to prepare the bill on information furnished and without commanding that the court present it to the grand jury, which has not been instructed respecting the crime charged and presumably is ignorant in many eases of its essential constituents. The Government claims a right to pursue this practice, and I am not called upon to question it. When, however, indictments so obtained are presented as authority for imprisoning men and transferring them to distant States to stand trial among strangers, the circumstances under which they are obtained must be considered in determining their value and effect. I think the jury's finding in such case may be regarded as little more than a matter of form. It is not improper to say in passing that the practice is in my judgment attended with serious danger to the rights of individuals, inasmuch as it affords convenient opportunity for the perversion of criminal process to the advancement of private interests."

The court further said:

"Without regard, however, to the circumstances under which indictments are found, the courts will go behind them whenever it appears that the relator's safety or unjust imprisonment requires it. The right to personal liberty is too important to be overborne by anything short

of evidence that it has been forfeited. Mere matters of form and considerations based on notions of comity between courts have no proper place in trials on *habeas corpus.*"

But, even in according to an indictment the force of legal evidence of crime, all the courts have always conceded that it is, and can be at best, nothing more than secondary evidence, and can be regarded in its most favorable light only as the affidavit of the witnesses on whose testimony it was obtained. *This indictment failed to comply with the plainest requirements for the admission of secondary evidence in any court of law.*

In the matter of Dana (68 Fed. Rep., 886) the nature of an indictment as evidence was considered by Judge Brown. It was there held "that an indictment which presents a clear and consistent statement of facts is equivalent to an affidavit thereof upon the faith of the witness endorsed. on it, where other evidence of the facts is not conveniently attainable."

Thus, to attain even to the dignity of secondary evidence, three requirements are absolutely essential:

1st. That the names of the witnesses whose affidavit it is presumed to be shall be indorsed upon it;

2d. That the indictment shall present a clear and consistent statement of facts; and,

3d. That primary evidence be not conveniently attainable.

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The indictment offered in evidence in this case lacks each of these essential requisites. To consider an indictment as evidence of the facts stated in it, under any circumstances, is to depart from its original purpose, to put it to a use for which it was not intended, and to greatly enlarge its scope and functions. To consider it as *secondary* evidence is to substitute accusation for proof when, *primary* evidence is not at hand. To admit it as *secondary* evidence is to hold that when *primary* evidence cannot be introduced, proof of the commission of a crime and the existence of probable cause is to be dispensed with. To consider it as *secondary* evidence is open to almost all the other objections which exist against considering it as *primary* evidence.

But the indictment offered in evidence in this case and upon which alone the removal of the appellant is sought and which was regarded as conclusive evidence, which the appellant was not permitted to controvert, does not attain even the dignity of secondary evidence. *It is not indorsed even with the name of a single witness.* An indictment is only to be considered as secondary evidence when the names of the witnesses are indorsed upon it. The legal presumption which enables it to be considered even as secondary evidence arises from the fact that the witnesses' names are indorsed upon it. The presumption indulged in such cases is that the indictment contains a statement of the facts testified to by the witnesses whose names are indorsed upon it. Without this legal presumption the indictment could not be considered at all. Without the witnesses' names being indorsed upon it, the essential fact from winch the presumption arises does not exist and the indictment, is a mere pleading.

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In the Dana case Ridge Brown said that it was his opinion that an indictment "may be regarded as equivalent to a deposition of the facts ascertained by the grand jury upon the sworn examination of the witnesses whose names are indorsed on it, *and as such sufficient evidence for the issue of the warrant of arrest, under section 1014, when other evidence of the facts is not conveniently attainable.*"

In this case it was absolutely unindorsed with the name of any witness. It was regarded as not only sufficient "for the issue of a warrant of arrest under section 1014," but it was regarded as *conclusive evidence*, which the appellant was not permitted to controvert; justifying not merely the issue of a warrant of arrest, but a warrant of removal.

It was so regarded without any proof that "other evidence of the facts is not conveniently attainable." The prosecution not only failed to call such evidence, but the commissioner refused to allow the accused to interrogate witnesses who admittedly had been before the grand jury. An examination of the printed record will disclose that the accused was not accorded a preliminary bearing in any fair sense. It was a hearing in form merely.

The prosecution refused to announce the names of the witnesses that appeared before the grand jury (fol. 64).

The defendant was accused of making a fraudulent contract. Not only did the prosecution refuse to produce the contract or give any evidence in reference to it, but they successfully frustrated every attempt by the accused

to secure its production. Little, a witness called by the Government to establish the identity of the defendant, avoided service (fols. 122-123), so that it was only after the greatest difficulty that he was finally served. Mr. Driggs was called and testified that he attended at a session before the grand jury in the easter district of New York in July, 1903 (fol. 125). The prosecution declined to examine him (fol. 127). An attempt was made by the defendant to show that no evidence at all was given before the grand jury which found the indictment against the defendant but he was not permitted to do so (fols. 126, 127). Harry F. Burns testified that he was before the grand jury in connection with the case of U.S. *vs.* George W. Beavers. The defendant attempted to show by this witness that he gave no evidence before the grand jury upon which, taken alone or in conjunction with others, an indictment could lawfully be found (fol. 129). This the defendant was not permitted to do. The accused did not attempt to confine his examination of the witnesses called to what transpired before the grand jury. Every effort was exerted by counsel in his behalf to ascertain what facts bearing upon the issues were within the knowledge of the witnesses.

Questions which, if answered favorably to the accused, would have affirmatively established the absence of probable cause to believe the accused to be guilty of the crimes charged, and have contradicted the facts alleged in the indictment were excluded by the commissioner upon the objection of the prosecution in the same way in which he excluded answers which would have disclosed what, if any, testimony was given by the witnesses before the grand jury (fols. 152-157, 172-174). Thus all attempts on

the part of the defendant to introduce primary evidence were frustrated.

Amy Wren, the stenographer of the grand jury, who attended its 'session in July, 1903 (fol. 137), was not permitted to disclose the names of those who attended before it as witnesses while the matter of the U.S. *vs.* Beavers was under investigation (fols. 139, 140). The defendant made every possible effort by the examination of this witness (fols. 137 to 147) to ascertain the names of the witnesses who appeared before the grand. jury, so as, to call them and show', not what they did or said, before the grand jury; but to show that they could not furnish evidence against this defendant, and to controvert the facts alleged in the; indictment.

Mr. Youngs, the district attorney of the eastern, district of New York, where the indictment was found, was called as a witness. Any documentary evidence relating to the fraudulent. contract which the defendant was accused of making must have been in his possession or under his control. The commissioner before whom this pretended or sham. Hearing was had refused to direct the production/ of these papers, or to permit any question in reference to them or to permit the district attorney to disclose the names of the witnesses who, appeared before the grand jury while the matter of The U.S. *vs.* Beavers was under investigation (fol. 149).

From the examination of the witness Little, upon whose complaint the proceeding was instituted, an attempt was made to show that the defendant never made or signed

any agreement or contract with the Edward J. Brandt-Dent Company. All questions relating to this subject, the answers to which alone would not only have furnished primary evidence which would have made the introduction of the indictment as evidence unnecessary, but which would. have established conclusively the innocence of the defendant and controverted the facts alleged in the indictment, were prohibited (fols. 152, 155). Questions of the same general character were put to the witness Oldfield, and similar rulings were made.

The idea which seems to have actuated the prosecuting attorney and the commissioner was that every act which transpired before the grand jury and all the testimony that was given before that body necessarily was, by virtue of that fact alone, so highly privileged that it could not be repeated nor disclosed. In other words, both of these officials held the view, and the whole examination proceeded upon the theory, that all the proceedings had before the grand jury were, for all purposes and notwithstanding every reason which could be urged to the contrary, absolutely sacred (fols. 126, 127, 129, 137-147).

This view is in direct conflict with the authorities upon the subject.

It was formerly held that the proceedings of a grand jury were not open to subsequent examination, but every avenue should be closed which should lead to a scrutiny of their transactions. Doubtless this obligation of secrecy exists, so far as concerns the actual deliberations of the grand jury itself or the manner in which individual jurors voted.

But it has been held in a number of cases, in the Federal courts and in the courts of the several States, that the fact that a witness testified, the nature of his testimony itself, as well as any irregularity or improper conduct in the grand-jury room, are open in a proper case to full and free judicial investigation.

And in every case where the disclosure of these proceedings is necessary to protect the rights of the accused or any other person they are open to judicial inquiry for this purpose.

In U.S. *vs.* Coolidge, 2 Gall., 363 (1815), on a motion to quash the indictment, Judge Story received in evidence the affidavit of a witness that his testimony before the grand jury was not under oath. In this ease the court said:

"It is of the highest importance that this institution be preserved in its purity and that no citizen be tried until he has been regularly accused by the proper tribunal."

In Burdick *vs.* Hunt, 43 Ind., 381, it is said that there is no sufficient reason why the prosecuting attorney may not be called upon in a court of justice to disclose evidence given or proceedings had before a grand jury.

In Low's case, 4 Greenl., 439, the grand jurors were permitted to testify that they acted under the mistaken impression that it was sufficient if a majority of the jurors concurred in finding a bill and twelve had not concurred.

These cases arose on motion to quash the indictment.

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In Hunter *vs.* Randall, 69 Me., 183, in a civil action for malicious prosecution the plaintiff offered to prove the fact that certain witnesses testified before the grand jury, and showed by the testimony of the county attorney what these witnesses stated to the grand jury. This evidence was held admissible on appeal, the court holding that" the fact that a witness testified before the grand jury and the testimony given by him when otherwise competent, may be proved when the evidence is required for the purposes of public justice or the establishment of private rights."

Again, it has been held by a long and familiar line of authorities in New York and other States that a defendant may be entitled to an inspection of the minutes of the grand jury in a proper case shown, even when he contends that the evidence on which the indictment was found is insufficient in law to sustain it, and these authorities hold that the fact that the defendant was indicted without preliminary examination is a strong inducement to the court to look with favor on such an application (People *vs.* Molineux, 27 App. D., 60; People *vs.* Naughton, 38 How. Pr., 480; People *vs.* Bellows, 1 How. Pr. (N. S.), 149).

In People *vs.* Molineux, this language was used by judge Blanchard:

"The defendant's counsel in his moving affidavit makes allegations which in effect charge that the indictment in question was found upon evidence that is insufficient in law to sustain it and insist that the defendant should not be put to the expense, notoriety and ignominy of a public trial without first being allowed an opportunity to ascertain

whether the testimony before the grand jury was sufficient to establish a *prima facie* case against him in the eyes of the law, upon which he can be legally put to his defense. This contention of the defendant is ,sustained by abundant authority. *If the indictment was found without sufficient legal evidence to sustain it, it is not an indictment, in contemplation of law, and cannot stand"* (Code Cr. Pr., 256, 258 Peo. is. Clark, 8 N.Y. (Jr., 169; Peo. *vs.* Brickner, id., 221; Peo. *vs.* Met. Trac. Co., 12 id., 405).

These cases show that inquiry into the proceedings of a grand jury is by no means to be had only by a motion to inspect the minutes, but may be made in any way that justice demands—in a motion to quash the indictment, by motion in arrest of judgment, or oven in a civil suit.

The whole subject of the secrecy of the proceedings of the grand jury received careful and extensive consideration in the case of U.S. *vs.* Farrington, 5 Fed., 341, which arose in the northern district of New York.

This was a motion to quash the indictment because an attorney had appeared before the grand jury with exhibits, hank books, and had argued the case before them, and other incompetent testimony had been introduced.

Wallace, D. J., granting the motion, reviewed the authorities and made these conclusions:

"It is the duty of the court in the control of its proceedings W see to it that no person shall be subjected to the expense, vexation and contumely of a trial for a

criminal offense unless the charge has been investigated and a reasonable foundation shown for an indictment or information. It is due also to the Government to require before the trial of an accused person a fair preliminary investigation of the charges against him. The cases are frequent, where after all these precautions have been observed, it appears upon the trial that the Government has been subjected to discredit and expense which might have been avoided if there had been a more careful preliminary investigation.

"Notwithstanding the reasons which exist for insisting upon a rigid adherence to this practice in the interests of decorum, economy, and justice, it has been zealously maintained that so confidential and sacred should the proceedings of a grand jury be considered that every avenue should be closed which may lead to a scrutiny of their transactions. Accordingly ancient precedents have been enforced and oven extended in modern cases, and authorities are cited to the effect that not only is it not permissible to show any irregularity or misconduct, but also *that the lips of witnesses who appeared before them are to be sealed.*

"Other authorities are found which have adopted more liberal 'and it seems to me more sensible views * * * The rule which may be adduced from the authorities and which seems most consistent with the policy of the law is that *whenever it becomes essential to ascertain what has transpired before a grand jury ,it may be shown, no matter by whom; and the only limitation, is that it may not be shown how the individual jurors voted or what*

they said during their investigation, because this cannot serve any of the purposes of justice."

These principles were applied in U.S. *vs.* Kilpatrick, 16 Fed., 765, in which an indictment was quashed on the testimony of a grand juror that a certain examiner of the Department of Justice, who had appeared before the grand jury as a witness, had assisted in examination of witnesses and made statements regarding the sufficiency of testimony adduced. Judge Dick, speaking of the nature of testimony given before a grand jury, said:

"*A witness has no privilege to have his testimony treated as a confidential communication*, but he ought to be considered as deposing under all the obligations of an oath in a judicial proceeding and the oath of a grand juror is no legal or moral impediment to his solemn examination under the direction of the court, as to the evidence before him whenever it becomes material to the administration of justice."

In People *vs.* Naughton, 38 How. Pr., 430, it was said:

"*There is no secrecy imposed upon a witness before a rand jury either as to ,the fact of his being called before them, or as to what he testified to.* The minutes of the evidence taken are given to the district attorney. This seems conclusive that the names of the witnesses and their testimony before a grand jury are not required by law to be kept secret."

Many other cases support and emphasize the proposition that the proceedings of a grand jury, the

fact that a witness testified before it, and the nature of his testimony are not necessarily secret, but may always be disclosed to the extent that a due administration of justice requires (State *vs.* Broughton, 7 Ired., 96; State *vs.* Horton, 63 N. C., 595; U.S. *vs.* Reed, 2 Blatchf., 435; Peo. *vs.* Northey, 77 Cal., 634).

In the present case a due administration of justice and the substantial rights of the accused absolutely required that these witnesses should be allowed to testify as to what they said before the grand jury.

The indictment was offered as evidence of probable cause on which a removal was to be ordered, and. was in fact recommended by the commissioner. It was the only evidence offered. by the prosecution. It was offered as possessing probative force. If there be no obligation of secrecy as to what testimony was adduced before the grand jury which will prevent inquiry in a proper case, and if an indictment may be attacked as a pleading because it was obtained on *improper* and *incompetent* evidence, or, as in New York State, on evidence not *prima facie sufficient* (People *vs.* Ristenblatt, 1 Abb. R., 268; People *vs.* Strong, 1 Abb. N. S., 241), it is, a *fortiori*, open to attack when it is offered *as proof* and as the *sole proof* on which to base a removal. If the prosecution had offered witnesses to prove probable cause, whose testimony was incompetent or irrelevant, assuredly the defendant would have been entitled to destroy its probative force by showing that fact. The same rules of evidence govern before a grand jury as before any other judicial tribunal (U.S. *vs.* Kilpatrick, 16 Fed., 765; 1 Whart. Cr. L., sec. 493).

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To hold that the facts stated in an indictment are conclusive because witnesses are presumed to have testified to them before a grand jury is to accord to these facts, when stated in an indictment, greater force than is accorded the direct testimony of the witnesses upon whose testimony the indictment was found.

The doctrine that witnesses are precluded from testifying upon a preliminary hearing to the facts alleged in the indictment because they testified to them before the grand jury is absurd. The application of this principle to a trial would in most instances make it impossible to convict any person accused of crime, because in almost every ease those who testified against the accused before the grand jury are those upon whose testimony the prosecution relies to sustain a conviction.

When, therefore, as evidence of probable cause, an indictment is offered which has been found on the testimony of witnesses, the *probative force* of the indictment must be open to attack in the same manner as the probative force of the testimony on which it was obtained (*In re Woods*, 95 Fed., 288).

In the present case there was no attempt on the part of the appellant to disclose mere irregularities occurring in the grand-jury room. All such objections to the indictment as a pleading, it is conceded, may properly be left to the disposition of the trial court (Green *vs.* Henkel, 183 U.S., 249).

The right for which the appellant contends was the right to attack the indictment, not as a pleading, but as

evidence, by showing the incompetency of the evidence on which it was obtained.

It is no answer that the question of the competency of the testimony on which the indictment was found might be raised by a motion to quash the indictment or a motion in arrest of judgment. Those remedies would be available only after removal. The substantial right on which the appellant now relies is the right not to be removed from the district without probable cause; and when, as the sole evidence of probable cause, an indictment is offered which was obtained without evidence or upon incompetent evidence, he claims the right to show the absence of any evidence before the grand jury. or to destroy its effect as *proof* by showing the incompetency of the evidence on which it was obtained.

But, even. though, primary evidence is shown to be unattainable, an indictment cannot be considered as secondary evidence of facts alleged in it, unless it presents a clear, consistent, and satisfactory statement of evidentiary facts (*In re Dana*, 68 Fed., 886; U.S. *vs.* Pope, 24 U.S. Int. Rev. Rec., 29).

The present indictment shows on its face that it was drawn and designed as a pleading only and not as a statement of facts from which a judicial finding of probable cause might be made. It states in the language of the statute, the conclusions of the pleader, the result of evidence, not evidentiary facts. That it is intended only as a charge or accusation is shown by the fact that it is drawn in the very language of the statute.

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The meager facts which it attempts to allege are set forth in a variety of different °omits, each giving a different version of the state of facts which is alleged to constitute the crime. In one count the respondent is charged with receiving the sum of $810 on July 25, 1900, for procuring and aiding to procure a fraudulent contract; in another he is alleged to have received a *check* for $810 on the same day for the same purpose, dcc., the evident object being to frame the indictment so that it might be sustained by proof of any one of several transactions. This may be unobjectionable in a pleading, but in an affidavit it has the effect to cast doubt upon the knowledge of the affiant and to deprive the statement of whatever intrinsic force it would otherwise possess as an affidavit of facts known by the affiant to be true (United States *vs.* Greene, 100 Fed., 949; United States *vs.* Greene, 108 Fed., 816)).

This paucity of evidentiary facts and variation in the accounts of the same transaction in the various counts of the indictment, together with the consistent refusal of the prosecution to produce witnesses or documents and to examine these witnesses when produced, show that the withholding of all evidential facts was designed on the part of the prosecution, and indicate a total misapprehension on its part of the practice under section 1014, and an intent to effect a removal under circumstances which can be styled little less than abduction under form of law.

The alleged hearing accorded to the defendant was a mockery and a sham. Every rule and principle of evidence and justice was violated. The indictment, unindorsed as it was with the name of a single witness, was held to be conclusive evidence against the accused.

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The defendant is entitled to have the most favorable inferences drawn from the refusal of the commissioner to allow the questions propounded to be answered. Having offered in good faith to establish facts before the commissioner, and having been denied an opportunity, he is entitled before an appellate tribunal to the presumption that such facts exist (Scotland County *vs.* Hill, 112 U.S., 186; Powell *vs.* Pen, 127 U.S., 688; Rockefeller *vs.* Merritt, 76 Fed., 914; Ankeny *vs.* Clark, 148 U.S., 355).

The conduct of the prosecution upon the alleged preliminary hearing accorded the appellant in preventing the introduction of the primary evidence shown to be conveniently accessible, and the rulings of the commissioner in support thereof, were such as to create a presumption that the testimony of the witnesses, if produced, would have been favorable to the accused (Tayloe *vs.* Riggs, 1 Pet., 591; Hughes' case, 2 East. P. C., 1002; Greenleaf Ev., sec. 82).

"The rule of law," said Chief justice Marshall in Tayloe *vs.* Riggs, 1 Pet., 591, "is that the best evidence must be given of which the nature of the thing is capable; that is that no evidence shall be received which *presupposes greater evidence behind in the party's possession or power. The withholding of that better evidence raises a presumption that if produced it might not operate in his favor.*"

Primary evidence was shown to be within reach, and secondary evidence was preferred to it. Primary evidence was excluded and the secondary evidence was received as *conclusive*, and the defendant was not permitted to controvert such evidence.

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The presumption that. the witnesses whose names are indorsed upon a certified copy of an indictment have sworn to the facts alleged in it, and that such an indictment is secondary evidence of those facts, is not of itself sufficient to overcome the presumption of innocence with which the law clothes every person accused of crime. If this presumption was not rebutted by the presumption of innocence alone, it was certainly totally destroyed, not only by the failure of the Government to utilize the primary evidence, which was shown to be conveniently available, *but from the exclusion, in response to the objections of the Government, of all the affirmative primary evidence which was offered to controvert the facts alleged in the indictment* (Dunlap *vs.* U.S., 165 U.S., 502; Kirby *vs.* U.S., 174 U.S., 55; Graves *vs.* U.S., 150 U.S.,121.)

II.

There was no jurisdiction to apprehend the accused, because the complaint on removal was jurisdictionally defective, in that it was made entirely upon information, without alleging a sufficient or competent source of the affiant's information and ground for his belief, and without assigning any reason why the affidavit of the person or persons having knowledge of the facts alleged was not secured.

The whole complaint or affidavit is made on "information and belief." In the verification attached to the complaint the sources of the affiant's knowledge are alleged to be as follows:

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First. Official documents with reference to the making of the contract on file in the records of the United States and in the Post-Office Department.

Second. Letters and communications from the Edward J. Brandt-Dent Company with reference to said contract.

Third. The indictment.

Fourth. The bench warrant.

Fifth. "Personal conversations with the parties who had the various transactions with the said George W. Beavers in relation thereto."

The only documents of which copies are attached are the indictment and the bench warrant. The nature of the other documents is not even stated, nor is any attempt made to refer to their contents. The documents and letters, or certified copies of them, should have been attached, as these papers are manifestly the best evidence to show their contents, and some reason should have been assigned as the excuse for the failure to secure the affidavits of those persons, if any, who had personal knowledge of the transactions alleged in the complaint. There is absolutely nothing to show that the papers to which reference is made justify or tend to sustain, the charges made by Little. The reference to these papers, therefore, adds nothing to the strength of Little's affidavit. This objection is equally applicable to the information alleged to be derived "from personal conversations with the parties who had the various transactions with the said George W. Beavers in relation thereto." A. more

indefinite statement could hardly be framed. The names of the persons with whom these supposed' conversations were held are not furnished. The nature or substance of these alleged conversations is not set forth, nor is any time or place indicated when or where they took place, nor is there anything to show what these various transactions were. These nebulous conclusions do not state sources of information sufficient to sustain the averments of the complaint, all of which are upon information and belief. The only sources of information properly stated are the indictment and the bench warrant, and reference may properly be made to these papers merely for the purpose of showing that the indictment was found and the warrant issued in the eastern district of New York.

The bench warrant was referred to solely for the purpose of proving that it was issued in the eastern district of New York, and it has already been shown under part I that the indictment cannot be regarded as equivalent to an affidavit of the facts alleged therein, and therefore the reference to it in the complaint was merely for the purpose of showing that an indictment had been found.

From these references to the complaint it is clear that the information as to the facts which constitute the gist of the offenses charged was derived from sources *other than the indictment and the bench warrant*, and, as these sources are insufficiently alleged, it follow p that this important and essential part of the complaint is made upon information and belief without any proper reference to such alleged information.

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It is elementary that an affidavit or complaint entirely upon information and belief, without properly setting forth the sources of the affiant's knowledge and the grounds for his belief, is insufficient to confer jurisdiction upon the magistrate to cause the apprehension of the accused (Matter of Blum, 9 App. Div., 571; Blodgett *vs.* Race, 18 Hun., 181; Blythe *vs.* Tompkins, 2 Abb. Pr., 468; People *vs.* Cramer, 22 App. Div., 129; Comfort *vs.* Fulton, 13 Abb. Pr., 276; U.S. *vs.* Sapinkow, 90 Fed., 654; *Ex parte* Hart, 63 Fed., 249).

Such an affidavit, made solely upon information and belief derived from others whose names are not given by the person who swears that he has good reason to believe and does believe that a certain person, naming him, has committed au offense against the laws, describing it, does not meet the requirements of article IV of the amendments to the Constitution of the United States; that the probable cause mentioned in that article, which is to be supported by oath or affirmation, and upon which a warrant alone can issue, must be submitted to the committing magistrate, who must judge of the sufficiency of the ground shown for believing the accused party guilty. The magistrate, before issuing the warrant, should have before him the oath of the real accuser to the facts on which the charge is based and on which the belief or suspicion of guilt is founded.

In re Commissioners, 3 Woods Reps., 502.

In the United States against Burr, 2 Wheel. Cr. Cases, Judge *Times* said:

"The evidence is the oath of a person who has been informed by one not upon oath; and the deponent believes the fact to be true. I make no doubt of the truth of the affidavit; that is that the deponent has been informed that the facts stated are true. *Yet it is no legal evidence, and not being legal evidence, the court cannot act upon it.*"

It was held in construing a section of the Penal Code of the State of California, which statute is very similar to section 145 of the Code of Criminal Procedure of the State of New York, that a complaint on information and belief under such section did not give jurisdiction to issue a subpoena for a witness or a warrant for the arrest of the accused (U.S. *vs.* Collins, 79 Fed., 65; see also Johnson 'vs. U.S., 87 Fed., 187; U.S. *vs.* Polite, 55 Fed., 59).

In *Ex parte* Dimoning, 74 Cal., 164, the court expressed the following view:

"Under these provisions a magistrate has no jurisdiction to issue a warrant without some evidence tending to show the guilt of the party named in the warrant. * * * A mere affidavit in the form of an information containing no evidence and followed by no deposition stating any fact tending to show guilt is insufficient to support a warrant. The liberty of a citizen cannot be violated upon the mere expression of an opinion under oath that he is guilty of a crime."

In referring to complaints made in extradition cases, this court in Rice *vs.* Ames, 180 U.S., Mr. Justice Brown writing the opinion, recently took occasion to say:

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"The first two complaints which were dismissed, as well as the first count of the complaint under which the proceedings were finally had, were obviously insufficient, since the charges were made solely upon information and belief and no attempt was made even to set forth the source of information or the ground of affiant's belief. This is bad, even in extradition proceedings, which are entitled to as much liberality of construction in furtherance of the allegations of the treaty as is possible in cases of a criminal nature. * * * A citizen ought not to be deprived of his personal liberty upon an allegation which upon being sifted may amount to nothing more than a suspicion. While authorities on this subject are singularly few, it is clear that a person ought not to be arrested upon a criminal charge upon less direct allegations than are necessary to authorize the arrest of a fraudulent or absconding debtor" (citing Smith *vs.* Luce, 14 Wend., 237; Matter of Bliss, 7 Hill 187; Proctor *vs.* Prout, 17 Mich., 473).

"So too in applications for injunctions the rule is that the material facts must be directly averred under oath by a person having knowledge of such facts" (Waddell *vs.* Bruen, 4 Ed. Chan., 671; Armstrong *vs.* Sanford, 7 Minn., 49).

But even if it should be granted that a complaint on information and belief without stating facts within deponent's knowledge sufficient to justify a belief, is sufficient to justify the issuance of a warrant, this complaint is further defective in that it fails to state in any adequate manner the source of affiant's information, and does not show why the affidavits of persons having

knowledge were not obtained (U.S. *vs.* Sapinkow, 90 Fed., 654; Comfort *vs.* Fulton, 13 Abb. Pr., 276).

The rule existing in the State of New York in this respect in attachment cases (Steuben Co. Bank *vs.* Altberger, 78 N.Y., 253; Yates *vs.* Worth, 44 N.Y., 271) is well settled; and there is abundant authority to sustain the proposition that in such cases affidavits which do not state with precision and sufficiency the source of affiant's information are invalid to sustain an attachment (McCullough *vs.* Alby & Co., 9 N.Y. Sapp., 361; Selser Bros. Co. *vs.* Potter Prod. Co., 77 Hun., 313; Harroway *vs.* Flint, 19 Misc., 411).

So, too, in applications for injunctions, the rule is as stated by Mr. Justice Brown in Rice *vs.* Ames, *supra*, page 375—that the material facts must be directly averred by a person having knowledge of such facts. Certainly, a citizen should not be deprived of his liberty on less or slighter evidence than is required by common practice in proceedings that affect only rights of property.

III.

Even if evidence had been presented before the commissioner, the fact that the petition for the writ alleged that the accused was not within the Federal district where and when the crime charged in the indictment is alleged to have been committed in itself entitled the petitioner to the writ of habeas corpus as a matter of right.

The petition alleged (fol. 4) that " the circuit court of the eastern district of New York is without jurisdiction

to try the defendant for the offense charged in the said indictment; that at the several times therein mentioned your petitioner was not within the eastern district of New York, but was, and for a long time prior and subsequent to the said several dates mentioned therein, continually within the city of Washington, District of Columbia, which is not within the eastern district of New York."

Upon probable cause being shown, the writ of *habeas corpus* cannot be denied the petitioner, for it, then becomes a constitutional right (United States Rev. Statutes, sec. 755 ; Church on *Habeas Corpus*, section 94; Hurd on *Habeas Corpus*, 2d ed., 204; *Ex parte* Des Rophers, 1 McAll., 86; *In re* Winder, Fed. Cases, 17867; *Ex parte* Early, 3 Ohio Dec., 105; *Ex parte* Campbell, 20 Ala., 89; Nash *vs.* People, 36 N.Y., 607).

The only manner in which one restrained of his liberty may disclose a *prima facie* case to the court is by a duly verified petition for the writ. If facts are duly alleged in a duly verified petition for a writ of *habeas corpus*, they may be regarded as true, even after the granting of the writ and a return thereto, unless denied by the return or controlled by other evidence (Whitten *vs.* Tomlinson, 160 11. S., 242; Kohl *vs.* Lehlback, 160 U.S., 292; Cuddy, petitioner, 131 U.S., 280). A *fortiori* the allegation should be regarded as true before the issuance of the writ, for the purpose of making it the duty of the court to whom application is made to grant the writ and take proof upon the facts alleged.

If the appellant's contention, that there was no evidence before the commissioner that the accused

committed a crime triable within the eastern district of New York, is correct, then obviously this allegation of fact in his petition entitled him to the writ (Green *vs.* Henkel, 183 U.S., 249-261).

But if the view is taken that there was some evidence before the commissioner tending to show that the accused committed the crime charged within the eastern district of New York at the times alleged in the indictment, then the accused claims the right on *habeas corpus* to show by extrinsic evidence his absence from the district at the several times mentioned in the indictment. Such facts, conclusively established, would deprive the commissioner of jurisdiction.

Thus, in Greene *vs.* Henkel, 183 U.S., 249-261, this court said:

"We do not, however, bold that when an indictment charges no offense against the laws of the United States, and the evidence fails to show any, or if it appears that the offense charged was not committed or triable in the district to which removal is sought, the court would, be justified in ordering the removal, and thus subject the defendant to the necessity of making such a defense in the court where the indictment was found. *In that case there would be no jurisdiction to commit, nor any to order the removal of the prisoner.*"

Under the sixth amendment of the United States Constitution the defendant could be tried only in the district wherein the crime was committed. It was

incumbent upon the prosecution on the preliminary hearing to establish the presence of the accused within the eastern district of New York at the several times mentioned in the indictment. No attempt to do so, other than by the introduction in evidence of the indictment, was made. This indictment was not evidence, nor was it proof of this fact, as has been shown under part I of this argument; but even if the court intends to so far depart from the heretofore accepted view of an indictment as to consider it evidence, its probative force, as to this fact at least, was wholly destroyed by the uncontradicted sworn statement of the accused that he was not within the jurisdiction at the time when the crime was alleged to have been committed.

If the finding of the commissioner is deemed to have been made upon conflicting evidence, that finding was nevertheless the subject of attack upon this jurisdictional issue. This is not a case where a prisoner seeks a discharge on *habeas corpus* upon the ground that the offense was committed without the jurisdiction where the *locus in quo* has been found bra jury, nor is this a case where a judgment of a court of general jurisdiction imports that this fact was established. No attempt is now made to attack collaterally either the final order, decree, or judgment of a court of general jurisdiction. The place of the commission of the offense is, for the purpose of a preliminary hearing, to be regarded as a fact the establishment and existence of which is essential to the jurisdiction of the commissioner. It is a strictly jurisdictional fact and as such might be controverted upon *habeas corpus* proceedings, even though such a jurist dictional fact had been previously

established by a final judgment of a court of general jurisdiction (Noble *vs.* Union River Logging Co., 147 U.S., 165-173; Scott *vs.* McNeal, 154 U.S., 534; Roderigas *vs.* East River Savings Inst., 63 N.Y., 460-464; People *vs.* Board of Health, 140 N.Y., 1; Miller *vs.* Amsterdam, 149 N.Y., 288; McLean *vs.* Jephson, 123 N.Y., 142).

To use the language of this court:—

"It is firmly established that if the court which renders a judgment has not jurisdiction to render it. either because the proceedings, or the law under which they are taken, are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally, and the defendant who is imprisoned under and by virtue of it may be discharged from custody on *habeas corpus*" (Hans Neilson, petitioner, 131 U.S., 176, 182; *Ex parte* Lange, 18 Wallace, 163; *Ex parte* Siebold, 100 U.S., 371).

But the record in this case is not entitled to be regarded even as the final judgment of a court of limited or inferior jurisdiction, much less is it to be accorded the same weight and presumption of validity to which a judgment of a court of general jurisdiction is entitled.

The commissioner in proceedings under section 1014 does not hold a " court " (Todd *vs.* U.S., 158 U.S., 278). Nor is he in the constitutional sense a judge (Rice *vs.* Ames, 180 U.S., 371, 378). He is a mere ministerial officer upon whom, while acting as a committing magistrate in such proceedings, is imposed the exercise of duties which are judicial in character (U.S. *vs.* Schumann, 2 Abbs, U.S.

Reps., 523; U.S. *vs.* Jones, 134 U.S., 483; U.S. *vs.* Erwing, 140 U.S., 142; Re Ellerbe, 13 Fed., 530; In re Mason, 43 Fed., 510; *Ex parte* Perkins, 29 Fed.) 900; In re Perkins, 100 Fed., 953; U.S. *vs.* Hughes, 70 Fed., 972).

He cannot punish for a contempt committed in his presence (*Ex parte* Perkins, 29 Fed., 900; Re Mason, 43 Fed., 510; *In re* Perkins, 100 Fed., 950). And even the power of Congress to invest him with the requisite authority for this purpose has been questioned (*Ex parte* Dole, 7 Phila., 595).

In these proceedings he exercises no judicial functions except the single one of determining whether or not there is probable cause to believe a person accused guilty of a crime (U.S. *vs.* Hughes, 70 Fed., 972). Though not strictly an officer of the court, he has always been considered in the same light as a master in chancery or a register in bankruptcy, and subject to its supervision and control (U.S. *vs.* Allred, 155 U.S., 595). Unquestionably his proceedings must be regarded as proceedings of an inferior order, since his authority is wholly statutory, his duties largely ministerial, and his judicial functions confined to a particular class of proceedings under a particular statute, which designates the course of procedure which the commissioner is bound to follow (U.S. *vs.* Allred, 155 U.S., 595; Black on Judgments, sec. 283 and citations).

The rule is well settled that the finding of a quasi-judicial officer of facts, the existence of which is essential to give him jurisdiction, is not conclusive, but is always open to contradiction upon *habeas corpus* proceedings.

Thus—

"Arbitrators, assessors and all such officers exercising judicial functions cannot take jurisdiction simply by determining that they have it, but they must in fact have it before their decisions can have any validity, and the fact is always, everywhere, when their decisions are challenged, open to inquiry" (People ex rel. Wasson *vs.* Schuyler, 61) N.Y., 242-247).

So, too, in cases of courts-martial and delinquency courts and decisions of the Land Department of the Government, these being tribunals of limited and inferior jurisdiction, whether their records recite jurisdictional facts or not, it has been uniformly held that their judgments are .open to impeachment by extrinsic evidence, showing want of jurisdiction (People ex rel. Frey *vs.* Warden, 100 N.Y., 20-26; Adams *vs.* S. & W. R. R. Co., 10 N.Y., 328; Mills *vs.* Martin, 19 Johns, 7; People *vs.* Cassells, 5 Hill, 164; Greenleaf on Evidence, 470; Ex parte Watkins, 8 Peters, 207; Hardin *vs.* Jordan, 140 U.S., 401).

The finding of the commissioner. upon questions of fact, especially where these facts are essential to confer jurisdiction, has never been regarded as conclusive upon the district judge to whom application for removal is made, nor has any question ever arisen, so far as we are aware, as to the right of the court, either upon application for removal, or upon *habeas corpus*, to review the facts found by the commissioner (Re Dana, 68 Fed., 886; U.S. *vs.* Green, 100 Fed., 941; U.S. *vs.* Greene, 108 Fed., 816; Green *vs.* Henkel, 183 U.S., 241; U.S. *vs.* Brawner, 7 Fed.,

88; Price *vs.* McCarthy, 89 Fed., 84-86; Re Martin, 5 Blatchf., 309; U.S. *vs.* Fowkes, 49 Fed., 50; 3 C. C. A., 394; Re Woods, 95 Fed., 288; Re Wolf, 27 Fed., 686).

The legal effect of a warrant issued by the chief executive of a State in an interstate rendition proceeding is that it is but prima facie sufficient to hold the accused, and the jurisdictional facts recited in such warrant are subject to be rebutted by proof on *habeas corpus* (Corkran *vs.* Hyatt, 188 U.S., 691-711; Robb *vs.* Connolly, 111 U.S., 624; People ex rel. Corkran *vs.* Hyatt, 172 N.Y., 176; People ex rel. Lawrence *vs.* Brady, 56 N.Y., 182; *Ex parte* Todd, 57 L. R. A., 566; Matter of Cook, 49 Fed., 823; *Ex parte* Hart, 63 Fed., 260; Work *vs.* Connington, 34 Ohio St., 64; Matter of Manchester, 5 Cal., 287; 15 Am. & Eng. Encyl. of Law, 2d ed., 204). So in the State courts it has been uniformly held that whether or not the accused committed the acts complained of while actually present within the demanding State, is jurisdictional, and it is clearly competent in such cases to show in habeas corpus proceedings by parol evidence that the accused was not within the demanding State when the alleged acts were committed, however regular the extradition papers may be (*In re* Mohr, 73 Als., 508; Wilcox *vs.* Nolze, 34 Ohio St., 320; Hartman *vs.* Aveline, 63 Ind:, 344; Jones *vs.* Leonard, 50 Iowa, 106 ; Hibler *vs.* The State, 43 Texas, 197; Matter of Manchester, 5 Cal., 237).

By analogy the same rule should be applied here.

It is well settled that the presence of the accused in the demanding State at the time of the alleged commission

of the offense charged is a prerequisite to entitle the demanding State to the rendition of the accused, and it may be regarded as equally well settled in this court that, where there is 'no evidence before the governor to sustain his finding of fact that the accused was within the demanding State at the times alleged, the court will discharge the prisoner on *habeas corpus* (Corkran *vs.* Hyatt, 188 U.S., 679, 711; Robb *vs.* Connolly, 111 U.S., 624).

Whether the person accused of crime was or was not actually present in the demanding State at the times alleged in the indictment is a jurisdictional fact to be inquired into and determined upon *habeas corpus* proceedings. This is so because of the judicial interpretation placed upon the constitutional provisions relating to the interstate rendition of those who have fled from justice of the demanding State and upon section 5278 of the United States Revised Statutes, which renders the constitutional provision, to which reference has been made, operative. For the same reasons, in proceedings under section 1014, whether the court to which removal is sought has jurisdiction to try the accused for the offense charged, or, in other words, whether the accused did in fad commit the offense charged within the district to which removal is sought, are questions which are the abject of judicial inquiry in *habeas corpus* proceedings.

The provisions of section 1014 direct the officers therein named to arrest and. imprison or bail the accused, as the case may be, not for trial in any court to which it may be sought to remove him, but "*for trial before such court of the United States as by law has cognizance of the*

offense," and * * * "seasonably to issue * * * a warrant for his removal to the district where trial is to be had "—i. e., where it may lawfully be had.

These provisions are in harmony with that portion of the sixth amendment of the Constitution of the United States which guarantees to persons accused of crime the right of trial by jury within the State and district wherein the crime was committed by providing that—

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury in the State and district wherein, the crime shall have been committed."

Clearly, in removal proceedings it is quite as essential to establish upon the preliminary hearing or upon *habeas corpus* proceedings that the accused, at the times mentioned in the indictment, was not in fact within the district to which removal is sought, as it is to establish such fact in an interstate rendition proceeding. This is not an attempt to establish an alibi, which is purely a matter of defense to be passed upon by the trial court. It is an earnest effort to controvert an allegation of a fact vital to the jurisdiction of the court, without the existence of which the whole proceeding is rendered null and void. This proceeding presents the stronger case of the two for the application of this doctrine, for here no question of the court's right to interfere with the determination of the chief executive of a sovereign State can arise. Indeed, the only method afforded the accused of reviewing the commissioner's finding and the order of the district judge

directing the removal of the prisoner is by writ of *habeas corpus*. Neither can any question of constructive presence of the accused at the times alleged in the indictment within the district to which removal is sought, be raised here. In each count of the indictment the offense charged is alleged to have been committed by the accused while he was then and there within the eastern district of New York.

It may be said that the accused has waived his right to raise this question for the first time in his petition for the writ by reason of his failure to offer such proof before the commissioner, but such objection can find no authoritative support in the decisions of the courts nor in reason. The question of the jurisdiction of the court may be raised at any stage of a criminal proceeding in the same or in another tribunal. It is never waived by a defendant, and he is not barred from raising it, even because of negligence or delay (Bishop's New Cr. Proc., sec. 316, par. 2; Hughes' Cr. L. Proc., see. 2509; U.S. *vs.* Rogers, 23 Fed., 658; U.S. *vs.* Crawford, 47 Fed., 566; Dred Scott *vs.* Sanford, 19 How., 402; *In re* Webb, 89 Wis., 854; Mexican Bank *vs.* Davidson, 157 U.S., 208).

The refusal of the circuit court to grant the writ can in no way be regarded as a conclusive finding by it, upon the facts before it, that the accused was not entitled to the writ. The sworn statement of the accused, which, if true, not only entitled the accused to the writ, but to an immediate discharge, stood before the court alone, uncontrolled by other evidence and uncontroverted, and yet it was brushed aside as though it were unworthy of belief or consideration.

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"As a witness, a defendant is no more to be visited with condemnation, than he is to be clothed with sanctity, simply because he is under accusation and there is no presumption of law in favor or against his truthfulness."

Allison *vs.* U.S., 160 U.S., 226.

Upon this appeal all questions of law or fact arising upon the record, including the evidence, are open to the consideration of this court, and this appellant is not bound by the finding of the circuit court upon the facts before it that this was not a proper case in. which to grant the writ, for in such cases the circuit court, has no authority to make conclusive findings of fact, as it might do in an action at law upon waiver of a jury, or in cases of admiralty (Johnson *vs.* Sayre, 158 U.S., 115, 116; *In re* Neagle, 135 U.S., 1 to 42; Bond *vs.* Dustin, 112 U.S., 604; Ralli *vs.* Troop, 157 U.S., 386, 415, 417).

Conclusion

It is therefore submitted that the order appealed from should be reversed and the appellant discharged.

Bankson T. Morgan,
Max D. Steuer,
William M. Seabury,
Of Counsel for Appellant.

Washington, *March 7, 1904.*

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APPENDIX

Proposed Amendment of Section 1014 of the Revised Statutes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That where any person indicted for any crime or offense against the United States in any judicial district, or in any Territory, or the District of Columbia shall be, or be found in any other judicial district, or in any Territory or the District of Columbia, it shall be lawful and it is hereby made the duty of the district attorney of the district or Territory or the District of Columbia in which such indictment is found to deliver, or cause to be delivered, a copy of such indictment certified by the clerk of the court in which the same is pending to a judge or justice of the United States court in the judicial district or to a judge or justice of the highest court of the Territory or the District of Columbia where such indicted person is or may be found; and, thereupon, it shall be the duty of such. judge or justice to issue to the United States marshal of the judicial district or Territory or District of Columbia a warrant for the arrest of the person named in the indictment, and upon the return of the warrant with the body of the person so named, the judge or justice shall, upon being satisfied that the person arrested is the person indicted, make an order to the marshal directing the removal of such person to the judicial district or Territory or District of Columbia wherein the indictment

is pending, and it shall be the duty of the marshal to execute such order.

"In bailable cases the judge or justice before whom such proceedings are had may admit the defendant to bail for his appearance at the court to which he is held to answer the indictment."

After the passage of the bill by the Senate and its transmission to the House, it is reported in the newspapers that the following amendment was proposed by the Attorney General:

"But nothing herein contained shall be held to require such judge, justice or commissioner to make an order of removal in any case where it shall be shown that the defendant, by reason of absence from the district from which the indictment is found, could not have committed the offense with which he is charged."

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In the Supreme Court of the United States.

OCTOBER TERM, 1903.

GEORGE W. BEAVERS, APPELLANT,
v.
WILLIAM HENKEL, UNITED STATES marshal.

No. 535.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF APPELLEE.

STATEMENT OF THE CASE.

This case is brought here by the appellant for the purpose of reviewing a final order of the circuit court of the United States for the southern district of New York, denying an application for a writ of habeas corpus and a writ of certiorari ancillary thereto. At the time of the filing of the petition for these writs, to wit, on the 10th day of November, 1903, the appellant, George W. Beavers, was in the custody of William Henkel, United States marshal for the southern district of New York, under a warrant of removal issued by Hon. George C. Holt, United States district judge for the southern district of New York

(Record, pp. 4 and 5), under and pursuant to the provisions contained in section 1014 of the Revised Statutes of the United States, which reads as follows:

> SEC. 1014. For any crime or offense against the United States the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.

The various proceedings preliminary to the issuance of such warrant of removal, and the application to the circuit court for said writs of habeas corpus and certiorari, were substantially as follows:

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On the 23d day of July, 1903, the United States grand jury for the eastern district of New York returned an indictment against the appellant, George W. Beavers, wherein he was charged, under six different counts, with having violated section 1781 of the Revised Statutes of the United States. (Record, pp. 14 to 20, inclusive.) The indictment charges that George W. Beavers, being an officer of the Government of the United States, to wit, Superintendent of Salaries and Allowances in the office of the First Assistant Postmaster-General of the United States, unlawfully did take and receive certain moneys from the Edward J. Brandt-Dent Company for procuring and aiding to procure for said company a contract from the Post-Office Department of the United States Government.

On the 14th of day August, 1903, a bench warrant was duly issued by said court for the arrest and apprehension of the said George W. Beavers, which bench warrant was returned on the 3d day of September, 1903, by the United States marshal for said district with the indorsement thereon that the defendant could not be found. (Record, p. 13.) Proceedings were thereupon instituted in the southern district of New York under and pursuant to section 1014 of the Revised Statutes, for the purpose of securing the arrest and removal of, said George W. Beavers from said southern district of New York to the eastern district of New York to answer the charges contained in said indictment.

On the 3d day of September, 1903, Frank E. Little, a United States post-office inspector, made a sworn complaint in writing before Samuel M. Hitchcock, a United

States commissioner in and for the southern district of New York, which complaint in substance charged, upon information and belief, the commission by the defendant In the eastern district of New York of the crime defined by section 1781, Revised Statutes. This complaint further alleged with great particularity the sources of the inspector's information upon which said complaint was based. (Record, p. 11.)

A certified copy of the indictment was attached and made a part of the complaint before the commissioner, who thereupon issued a warrant, reciting the substance of the complaint, and directing the arrest of the said George W. Beavers, and his production before him to be dealt with according to law. (Record, pp., 6 and 7.) The defendant was thereafter, to wit, on the 8th day of September, 1903, duly arrested by the United States marshal, William Henkel, and taken before the said commissioner for examination. (Record, p. 7.) Upon the hearing before the commissioner, the Government introduced evidence identifying the accused as the person described in and charged in the indictment, and also a certified copy of the indictment, and thereupon rested its case. (Record, p. 25.)

Counsel for the defendant moved to dismiss the proceedings upon. the ground that the indictment was insufficient, and that the Government had failed to make out a prima facie case (Record pp. 34 and 35), which motion the commissioner denied.

The defendant thereupon called certain witnesses, who testified with reference to efforts which the defendant had

made for the purpose of securing the attendance of certain witnesses, and attempted to attack the proceedings which had taken place before the United States grand jury for the eastern district of New York preliminary to the finding of the indictment. There was no evidence offered by the defendant for the purpose of showing that a crime had not been committed, nor was there evidence offered for the purpose of showing that the defendant George W. Beavers was in no way concerned in the commission of the crime charged in the indictment.

At the conclusion of the taking of the testimony before the commissioner, a motion was made to dismiss the proceedings for the reasons set forth in the motion (Record, pp. 99, 100, and 101), which motion was denied, and the commissioner, having found that there was probable cause for believing the defendant guilty of the offense charged in the indictment, thereupon committed the defendant to the custody of the United States marshal for the southern district of New York to await the order of removal of the district judge (Record, p. 102). Application was thereupon made by the district attorney to the United States district judge for the southern district of New York for an order for the removal of the defendant under and pursuant to section 1014, Revised Statutes. An order was thereupon made and a warrant signed by the judge on the 10th day of November, 1903, for the removal of the defendant to the eastern district of New York. (Record, pp. 4 and 5.)

But before said warrant of removal was executed the appellant on the same day presented his petition to the

circuit court of the United States for the southern district of New York for a writ of habeas corpus and certiorari, setting forth the foregoing facts, and a copy of the order of removal, which he alleged to be illegal and in violation of his constitutional rights. (Record, pp. 1, 2, 3, and 4.) The matter was heard before the Hon. E. Henry Lacombe, United States circuit judge, on the 11th day of November, 1903. And it appearing to said court that the restraint of the petitioner was not unlawful, an order was entered denying appellant's application for said writs (Record, p. 106), from which order the defendant appealed to this court, the defendant being admitted to bail pending the decision.

OFFICE OF THE WRIT OF HABEAS CORPUS.

The precise question to be decided upon this appeal is, whether the United States district judge for the southern district of New York, who made the order for the removal of the defendant, had jurisdiction to make it, and if he had, the question whether upon the merits he ought to have made it is not one which can be reviewed by means of the writ of habeas corpus. (Greene v. Henkel, 183 U. S., 249, 261.)

A writ of *habeas corpus* and *certiorari* ancillary thereto can not be used to perform the office of a writ of error. *Ornelas* v. *Ruiz*, 161 U. S., 502; *Terlinden* v. *Ames*, 184 U. S., 270; *Wright* v. *Henkel*, 190 U. S., 40, 57; *Greene* v. *Henkel*, 183 U. S., 249.

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A writ of *certiorari* does not enlarge the office of a writ of *habeas corpus*, but is employed in connection with such writ in order that the court may ascertain from the record whether *jurisdictional questions* have been disregarded, and the defendant is restrained of his liberty without due process of law.

Ex parte Lange, 18 Wall., 163.
Ex parte Virginia, 100 U. S., 339.

When, therefore, the writ of *certiorari* is resorted, to as ancillary to the writ of *habeas corpus*, the examination, while confined to jurisdictional questions, necessarily takes a wider range., and it often becomes a matter of some difficulty to distinguish the jurisdictional questions involved from those questions involving mere irregularities or erroneous rulings of the committing magistrate upon the admission or rejection of evidence. In view of the various contentions of counsel for appellant, we are, perforce, compelled to discuss many questions which we do not regard as properly before this court for its consideration upon an appeal of this character for the sole purpose of showing that such. questions are not jurisdictional in their nature. The questions which we regard as jurisdictional will first be considered.

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POINTS AND AUTHORITIES.

I.

The indictment sufficiently charges the defendant with the commission of a crime against the United States under section 17131 of the Revised Statutes.

The indictment in this case is framed under section 1781 of the Revised Statutes, and contains six separate and distinct counts. After setting forth, with great particularity, that George W. Beavers, during all of the times mentioned in the indictment was an officer of the Government of the United States, to Superintendent of Salaries and Allowances in the office of the First Assistant Postmaster-General, in the city of Washington, in the District of Columbia, and that said Beavers was charged, among other things, with the consideration of allowances for miscellaneous and incidental expenditures, and with the procuring of contracts and undertakings with and from persons proposing to furnish supplies to, said Post-Office Department involving the expenditures of moneys by the United States, charged that said George W. Beavers did unlawfully enter into a fraudulent agreement, contrary to his duties as such officer, to procure and aid in procuring for the Edward J. Brandt-Dent Company, a contract for said company with the Government of the United States for furnishing certain automatic cashiers to the Post-Office Department, and that said Beavers, as such officer, did unlawfully take and receive certain moneys from said company for procuring and aiding to procure a contract for said company with the Post-Office Department of the United States for the purchase of automatic cashiers.

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Section 1781, Revised Statutes, so far as the same is applicable to the case at bar, is as follows:

> * * * any officer or agent of the Government who, directly or indirectly, takes, receives, or agrees to receive, any money, property, or other valuable consideration whatever, from any person for procuring or aiding to procure any contract * * * from the Government, or any department thereof * * * for any person whatever * * * shall be deemed guilty of a misdemeanor and shall be imprisoned not more than two years, and fined not more than ten thousand dollars.

It is respectfully submitted that the indictment here under discussion charges the defendant, George W. Beavers, in the language of the statute above quoted, with having committed such offense. And while the indictment was attacked on the hearing before the commissioner, and in the petition for writ of habeas corpus, on the ground that it was fatally defective and bad for duplicity, it would seem from an examination of appellant's brief that such points are not seriously urged upon the consideration of this court.

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II.

It is contended, however, that there was no jurisdiction to apprehend the accused because the complaint for removal was jurisdictionally defective in that it was made entirely upon information and belief, without alleging any proper sources of information and the grounds of complainant's belief, and without averring any reason why the person or persons having knowledge of the facts alleged was not secured.

The complaint alleges among other things as follows:

"Frank E. Little, being duly sworn, says that he is a United States post-office inspector, and further says on information and belief that," etc. And after stating the facts by proper allegations, wherein the certified copy of the indictment is expressly referred to and made a part of the complaint, the complaint further alleges (Record, p. 11):

> Deponent further says that the sources of his information are the official documents with reference to the making of the said contract, and the said transactions on file in the records of the United States of America and in the Post-Office Department thereof, and letters and communications from the Edward J. Brandt-Dent Company with reference to the said contract, and from the indictment, a certified copy of which is referred to in said affidavit as Exhibit A, and the bench warrant therein referred to as Exhibit B, and from personal conversations with the parties who

> had the various transactions with the said George W. Beavers in relation thereto; and that his information as to the whereabouts of the said George W. Beavers is derived from a conversation had with the said George W. Beavers in said southern district of New York in the past few days, and from the certificate of the United States marshal for the eastern district of New York indorsed on said warrant.
>
> Frank E. Little.
>
> Sworn to before me this 3d day of September 1903.
>
> Saml. M. Hitchcock,
> *U. S. Comm.*

It is respectfully submitted that the above allegations sufficiently set forth the source of complainant's information, and the facts upon which his belief was based. We assert that a certified copy of the indictment alone would in itself be sufficient information upon which to predicate a complaint of this character.

The case of *Rice* v. *Ames*, 180 U. S., 371, 374, is relied upon by the Government as sustaining this contention:

> The first assignment of error is to the effect that the commissioner issuing the warrant had no jurisdiction, because the complaint of Greer was upon information and belief, and not such as was required by the treaty or by section 5270 of the Revised Statutes. The first two complaints which were dismissed, as

well as the first count of the complaint under which the proceedings were finally had, were obviously insufficient, since the charges were made solely upon information and belief, and no attempt was made even to set forth the sources of information or the grounds of affiant's belief. This is bad, even in extradition proceedings, which are entitled to as much liberality of construction in furtherance of the objects of the treaty as is possible in cases of a criminal nature. Nor is it saved by the fact that Greer described himself as Government detective for the province of Ontario, and duly authorized by the Attorney-General to act as the agent of the Government to prosecute extradition proceedings. Ex parte Smith, 3 McLean, 121, 135; Ex parte Lane, 6 Fed. Rep., 34; In re Young Mfg. Co. (1900), 2 Ch., 753.

A citizen ought not to be deprived of his personal liberty upon an allegation which, upon. being sifted, may amount to nothing more than a suspicion. While authorities upon this subject are singularly few, it is clear that a person ought not to be arrested upon a criminal charge upon less direct allegations than are necessary to authorize the arrest of a fraudulent or absconding debtor. *Smith* v. *Luce*, 14 Wend., 237; *Matter of Bliss*, 7 Hill, 187; *Proctor* v. *Prout*, 17 Mich., 473. So, too, in applications for injunctions, the rule is that the material facts must be directly averred under oath by a person having knowledge of such facts. *Waddell* v. *Bruen*, 4 Ed. Chan., 671; *Armstrong* v. *Sanford*, 7 Minnesota, 49.

> We do not wish, however, to be understood as holding that, in extradition proceedings, the complaint must be sworn to by persons having actual knowledge of the offense charged. * * * If the officer of the foreign government has no personal knowledge of the facts, he may with entire propriety make the complaint upon information and belief, stating the sources of his information and the grounds of his belief, and annexing to the complaint a properly certified copy of any indictment or equivalent proceeding which may have been found in the foreign country, or a copy of the depositions of witnesses having actual knowledge of the facts, taken under the treaty and act of Congress. This will afford ample authority to the commissioner for issuing the warrant.

III.

Section 1014 of the Revised Statutes, when properly construed, is intended, in case of indictment, to furnish the Government a convenient and summary method for securing the appearance of the defendant before the United States court in which the indictment is found.

> In re Ellerbe, 13 Fed. Rep., 530.
> *U. S.* v. *Yarborough*, 122 Fed. Rep., 293.

It would seem from a careful analysis of this act of Congress that the courts, in construing its various provisions, have failed to recognize the true purpose and meaning of the law when applied to those cases in which indictments have been returned against defendants by

a Federal grand jury. We take the position that after a Federal grand jury has found a valid indictment against a person, charging him with the commission of a crime in violation of the laws of the United States within that judicial district, that there is no law of Congress which for a moment contemplates that such defendant, if he should flee to some other district or be found in some other State or district, that he would be entitled, as a matter of right, to a preliminary examination for the purpose of determining whether or not there was probable cause to believe that he was guilty of the offense charged.

The Constitution of the United States, in article 4, section 2, paragraph 2, provides as follows:

> A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime.

Under and pursuant to this provision of the Constitution, Congress in 1793 passed an act (1 Stat., 302) requiring the executive of any State or Territory, upon the production of a copy of the indictment, to surrender such fugitive to the demanding State. This law is found in section 5278 of the Revised Statutes, and is as follows:

> Whenever the executive authority of any State or Territory demands any person as a fugitive from justice of the executive authority of any

> State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the State or Territory making such demand, shall be paid by such State or Territory.

In view of this constitutional provision, and the act of Congress above quoted, the proposition that the United States Government intended to make it more difficult to secure the arrest and appearance for trial of offenders against its laws than in case of interstate rendition is startling, to say the least. The question, therefore, arises as to whether Congress has done so by enacting the law contained in section 1014 of the Revised Statutes. It will, I think, be admitted that Congress has the power to provide that a bench warrant for the arrest of a person indicted for violating a law of the United States might be served

in any judicial district of the United States in which the defendant should be found. But instead of passing such a law, Congress enacted:

> For any crime of offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail * * * where he may be found, *and agreeably to the usual mode of process against offenders in such State*, and at the expense of the United States, be arrested, imprisoned, or bailed as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.

The first question which presents itself for consideration is, What interpretation and meaning is to be given to the phrase "agreeably to the usual mode of process against offenders in such State" in a case such as the one at bar, where an indictment has already been found? What is the mode of process in the State of New York in a case in which a person has already been indicted?

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The State of New York is divided into counties, and in all or nearly all of these counties there is a county court having jurisdiction of all crimes and offenses committed against the laws of the State in said counties. If a crime or offense be committed in one county, and the evidence is presented to the grand jury in that county and an indictment returned against the offending parties, upon such indictment the county court issues its bench warrant, and the sheriff of that county is thereupon authorized to proceed into any other county in the State where the person indicted happens to be found, and thereupon arrest him and take him before the court of the county in which the indictment was found, to be there imprisoned or bailed under the direction and authority of the court, as the case may be.

But such defendant, although arrested in some other county in the State, is not entitled to have an examination either at the place where he is arrested or in the county where the indictment was found. So it will be seen that the usual mode of procedure in the State of New York, where this defendant was apprehended, is not to allow a committing magistrate to inquire anew into the facts which were before the grand jury that found the indictment. And it seems unreasonable to contend that the Federal Government, by the enactment of this law, intended to throw about itself obstacles which it expressly provided against in the case of intra-State extradition.

It appearing, therefore, that, according to the usual mode of process against offenders in the State of New York, in a case in which an indictment had already been

found the person indicted would not be entitled to a preliminary examination, the question naturally arises as to whether there be any other interpretation of this law which would be at the same time in full accord with the facts presented in this case. The law says that the offender may be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. This action, of course, is required to be done "agreeably to the usual mode of process against offenders" in the State of New York. Does not this language, therefore, simply mean that the commissioner is empowered by this law to arrest and imprison or bail the offender, in accordance with the laws of the State of New York, for trial before the United States court for the eastern district of New York? In other words, is it reasonable to suppose that the phrase "agreeably to the usual mode of process against offenders in such State" must necessarily embrace everything which is ordinarily connected with a preliminary examination, and that too in a case in which a preliminary examination would not be allowed under the laws of the State of New York, and in which a preliminary examination is absolutely unnecessary?

And again, while the language of this section is sufficiently broad and comprehensive to allow a preliminary examination in a case in which a preliminary examination would ordinarily be allowed under the laws of the State of New York, the mere fact that such language is used, which is sufficiently broad to cover a case of arrest before indictment in which a preliminary examination is usually given as a matter of right, ought not to be construed as

conferring the right to a preliminary examination in a case where no such examination could be demanded under the laws of the State of New York, namely, after the finding of an indictment.

Our contention, therefore, is, that in a case where an indictment has been found by a Federal grand jury of some other district, that this law under discussion simply authorizes a United States commissioner to do that which in the absence of the law he would not have the power to do, namely, to issue his warrant for the arrest of the offender, and to imprison the offender to await the order of removal subsequently provided for, or to bail the offender, as the case may be, for trial before the court of the United States in which the indictment was found, all of which he must do in accordance with and agreeably to the usual mode of process against offenders in the State of New York, but that this law does not reasonably or necessarily require him, the commissioner, to hold a preliminary examination in the ordinary sense and acceptation of such a proceeding.

There is nothing said about a preliminary examination in the law, and every provision and phrase of the law could be given full force and effect as applied to all of these acts of the commissioner without requiring him to hold a preliminary examination. Such examination ought to be regarded as having been dispensed with by reason of the action of the grand jury that returned the indictment. This method of procedure, while giving full force and effect to all of these various provisions of law under discussion, necessarily contemplates that the commissioner should find that a valid indictment existed in

the court of the demanding district, and that the offender was the person named in the indictment. The finding of these facts is essential to authorize the commissioner to hold the offender for trial, as is apparent from the most casual examination of the law, just as the sheriff in making an arrest in the State of New York would be required in the first place to have a valid warrant for the apprehension of the person charged, and in the second place it would be necessary for such sheriff to ascertain the identity of the person to be arrested.

These things are necessary to confer jurisdiction or authority upon the sheriff to make a legal arrest, and it is, of course, necessary in a proceeding of this character that the commissioner should have a certified copy of the indictment in order that he might know that the preliminary hearing was unnecessary. And he should likewise require evidence or information that should satisfy his mind that the person named in. the indictment was the identical person brought before him. Being satisfied upon these two points, his duty under the statute is clear, namely, to hold the prisoner for trial before the United States court for the eastern district of New York in proper bail, and in default of bail to commit him to the custody of the marshal to await the action of the United States judge of the district upon an application by the United States attorney for the warrant of removal.

In the case of *Greene* v. *Henkel* (183 U. S., 258), Mr. Justice Peckham, in delivering the opinion of the court, said:

> From these facts it is apparent that the question is not before us whether the finding of an indictment is in a proceeding under section 1014 of the Revised Statutes conclusive evidence of the existence of probable cause for believing the defendant in the indictment guilty of the charge therein, set forth. The district judge in this case held that it was not, and sent the case back to the commissioner, before whom evidence was thereafter taken upon the subject, and a decision arrived at after considering all the evidence in the case. We are not, therefore, called upon to express an opinion upon the question. Upon all the evidence taken before the commissioner he has found that probable cause existed. We think that a fair interpretation of the language used by the district judge in granting the application for the warrant of removal shows beyond question that, from the evidence taken before the commissioner, the judge was of opinion that there existed probable cause, and that the defendants should, therefore, be removed for trial before the court in which the indictment was found.

While this court refused to pass upon the question as to whether the finding of an indictment, in a proceeding under section 1014 of the Revised Statutes, is *conclusive evidence of the existence of probable cause* for believing the defendant in the indictment guilty of the charge therein set forth, according to our view of this proceeding considered in the aspect of the ease now under discussion, it would seem that the *question of probable cause* is not in issue, for if this proceeding in a case where an indictment

has been found be regarded as merely a summary method for securing the removal or appearance of the defendant before the proper Federal court for trial, *and as it were a substitute for a provision of law which would allow a bench warrant, when an indictment is found, to run into any district in the United States, it would seem that the question, of probable cause is immaterial.*

Viewed in this light, we contend that the moment the commissioner became satisfied of the identity of the defendant, and that a valid indictment had been found against him in the eastern district of New York, that it was the commissioner's duty to require him to enter into a recognizance for his appearance before such court for trial, and in default to commit him to the custody of the marshal to await the action of the district judge on an application for removal; *that such action of the commissioner was not required by reason of the fact that the indictment showed the existence of probable cause, but rather by reason of the fact that the statute provides that method for securing his appearance for trial.*

This construction of section 1014 is neither novel nor is it without the support of judicial authority. In the case of In re Ellerbe (13 Fed., 530), decided in the circuit court for the eastern district of Missouri in 1882, Circuit Judge McCrary, in considering this section of the statute, said:

> It may, for the purposes of this case, be assumed that the district judge could inquire into the question of the jurisdiction of the court in Arkansas to try the prisoner for the offense charged. If such be the law the

> jurisdiction clearly appears. I do not think, however, that in a case such as this the district judge can go further and inquire into the question of the guilt or innocence of the prisoner. There may be cases in which the inquiry might properly extend to an examination into the question of probable guilt, but if so they are cases where there has neither been a preliminary examination nor an indictment in the district where the offense was committed, nor an order for the arrest of the prisoner by a court of the United States of competent jurisdiction, and sitting in that district. See opinions of Mr. Justice Miller and Judge Love 1 Woolw., 422.

In the case of the *United States* v. *Yarborough*, 122 Fed., 293, decided by the district court for the western district of Virginia in April, 1903, Judge McDowell distinctly recognizes the construction of the statute for which we are contending. His language is as follows:

PROCEEDINGS BEFORE THE COMMISSIONER.

> While there are numerous officers given authority by section 1014 to hold the preliminary hearing of one arrested for removal to another district, it is preferable that, after the arrest, the accused should be taken before the nearest United States commissioner. In all cases the commissioner must first be reasonably satisfied as to the identity of the prisoner; and, if the prisoner denies that he is the person accused of the offense, opportunity should be allowed both sides for a full investigation of this question.

If the identity of the prisoner is not denied, or has been established, the commissioner should then (in a bailable case) fix the amount of bail to be taken for the appearance of the accused before the court or magistrate before whom he is to be tried. If the accused is charged with a nonbailable offense, or can not give bail, or refuses to give it, the commissioner should commit him to await the action of the district judge of this district (or possibly of any Federal judge having jurisdiction in this district) as to awarding a warrant of removal.

PROBABLE CAUSE.

The decided cases exhibit much diversity of opinion as to the powers and duties of commissioners, when holding these preliminary examinations, other than as to deciding the question of identity and as to taking bail. Much of this confusion might perhaps have been obviated by classifying the cases which may come before the commissioners. The right of the commissioner to require evidence of probable cause of guilt, for instance, would seem to depend on the character of the case before him.

(a) Previous indictment.—If the accused had been previously indicted in the district in which he is wanted, it seems to me that it would, be *supra dignitate* for a commissioner (or it might be a justice of the peace) to examine anew the grounds, on, which a grand jury returned the indictment. Usually the accused has had an examining trial and been held

over before his case is laid before a grand jury. And the indictment is a complaint, nearly always founded on the testimony of witnesses, made on the oaths of the grand jurors.

(b) Previous preliminary trial.—If the papers laid before the commissioner here show that the accused has had, in the district from which he fled or in which he is wanted, a preliminary hearing, and had been held over, I do not perceive any right on his part to demand another preliminary trial on the question of probable cause to believe him guilty. The former trial was of this question, and the commissioner who held that trial was convinced that there was probable cause.

(c) Bench warrant without indictment.—Where affidavits have been laid before a Federal judge charging one with criminal contempt of court, for instance, it is not unusual that an attachment or a bench warrant issues. If the accused has fled to some other district it is not uncommon practice that copies of the affidavits and bench warrant are certified and sent to the district where the accused is supposed to be. Such cases are of rare occurrence; but if they do occur here the commissioners are advised not to hear evidence from the accused offered to show innocence of the charge. It may be safely presumed that the judge issuing the bench warrant has examined the question and decided that there was probable cause to believe the accused guilty before having the papers certified to another district.

> *(d) Mere verified complaint before foreign magistrate.*—It may be the case that the action against the accused in the district in which he is wanted has gone no further than the making of a complaint against him before a committing magistrate, on which a warrant of arrest may or may not have been issued. In this case I am inclined to the opinion that the accused is entitled to have the commissioner in this district hear evidence of probable cause of believing him guilty before he is required to give bail to appear before the trial court or is committed awaiting the issue of a warrant of removal. But the verified complaint is prima facie true, and further evidence from the Government should not be required unless evidence offered by or in behalf of the prisoner has created a substantial doubt as to the existence of probable cause to believe him guilty.

The case at bar clearly comes within subdivision (*a*), entitled "Previous Indictment," and the question of the existence of probable cause by virtue of the finding of the indictment is eliminated from the commissioner's consideration. In such a case, while the commissioner sits as a committing magistrate, the presentation of a certified copy of the indictment at once precludes the necessity of an investigation as to the existence of probable cause, in the sense in which that expression is ordinarily understood as applied to a preliminary examination. The commissioner's inquiry is confined to the validity of the indictment upon its face, which is a question of law, and the identity of the person apprehended, which is a question of fact. In other words, his duties are similar to those of a sheriff in executing a warrant of arrest. If the warrant is valid

upon its face and the person arrested is the one named and described in the warrant, the sheriff's custody of the prisoner is lawful and will not be disturbed on a writ of habeas corpus. The question of probable cause does not enter into one any more than the other.

The Government's case, however, is not based upon the foregoing contention alone, but upon the further proposition that if the defendant be entitled to a preliminary examination after indictment under the proceedings instituted pursuant to section 1014, that a certified copy of the indictment, together with proof of identity of the defendant, constitutes a prima facie case sufficient to sustain a finding by the commissioner of the existence of probable cause.

IV.

If, in a proceeding under section 1014, the defendant after indictment is entitled to a preliminary examination for the purpose of establishing probable cause, a certified copy of the indictment and proof of identity of the defendant are sufficient to make out a prima facie case sufficient to sustain a finding of the commissioner of the existence of probable cause.

This proposition assumes that in a proceeding instituted under section 1014 of the Revised Statutes that the party arrested, both before and after indictment, is entitled to a preliminary examination, and that the Government is required to make out a prima facie case upon which a finding of probable cause could be predicated.

This question is not a new one, but, on the contrary, has been up for consideration before nearly every district court of the United States, and the courts are practically unanimous in holding that upon proof of defendant's identity, and the production of a certified copy of the indictment, sufficiently charging the commission of a crime by the accused within the district to which he is sought to be removed, that probable cause has been established sufficiently strong to sustain an order of removal.

In this connection it will be observed that the record fails to disclose any testimony offered in behalf of the appellant for the purpose of showing *directly* that the crime charged was not committed, or if committed that the defendant himself was in no manner concerned in its commission. An attempt was made, however, to attack the proceedings had before the grand jury prior to the finding of the; indictment, evidently for the purpose of proving *indirectly* that the crime charged had not been. committed. But this feature of the case will be considered in a subsequent proposition.

Counsel for the appellant rely upon certain decisions by Judge Brown, formerly 'United States district judge for the southern district of New York, in the following cases:

In re Dana, 68 Fed., 891.
United States v. *Greene et al.*, 100 Fed., 941.
United States v. *Greene et al.*, 108 Fed., 816.

Before entering upon a discussion of the many decisions sustaining the contention of the Government

under this proposition, we will briefly consider not only Judge Brown's opinions in the cases above referred to, but other opinions of that learned judge in similar cases.

United States v. Greene et al., 108 Fed., 816.

In this case Judge Brown followed the well-established rule that where at the hearing the commissioner had before him any competent legal evidence upon which to exercise this judgment as to whether there existed probable cause, that his finding of fact upon that question could not be reviewed by the court upon an *application for an order of removal.*

In the Green case (108 Fed., 816), at page 819, Judge Brown says:

> Upon the question of the existence of probable cause to believe that an offense has been committed the rule as respects any review of the commissioner's finding is the same whether the questions arise upon an application for removal to another district, made under section 1014, or upon habeas corpus and certiorari, or an appeal therefrom in cases of international extradition. in all such cases the question upon review never is whether the proof was such as would be required to convict the accused upon a trial by jury; but only as to the existence of any legal evidence before the commissioner upon which he might find that there was reasonable cause to believe that the crime has been committed.

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Citing *Bryant* v. *U. S.* (167 U. S., 104), and *Otieza* v. *Jacobus* (136 U. S., 330).

At the bottom of page 819 he further says:

> The evidence receivable in such preliminary examinations is not to be strictly limited by the technical rules applicable upon the final trial.

In the case of In re Price (83 Fed. Rep., 830) Judge Lacombe says:

> The testimony is not strong, but it does tend to show the commission of the offense charged; and under well-settled rules the finding of the commissioner as to probable cause should not be disturbed.

In the case of *Homer* v. *U. S.* (143 U. S., 207) it was held that on a criminal hearing the commissioner has full jurisdiction to decide all questions of fact for the purpose of the removal of the accused and his decision will not be reviewed on habeas corpus.

United States v. Green, 100 Fed., 941.

As above stated, Judge Brown in the Green cases holds that the commissioner is the judge of the facts. In no part of his opinion does he hold that the indictment is not' evidence, but, on the contrary, in the case of *U. S.* v. *Green* (100 Fed. Rep., 941, at p. 943) he says, after quoting In re Dana (68 Fed. Rep.) and In re Wood. (95 Fed. Rep., 288):

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> That the object of the proceeding is to enable the commissioner to ascertain for himself whether from the proof of facts and circumstances produced before him, there is probable cause to believe the defendant is guilty of the offense charged; that the mode of proceedings in such cases is precisely the same whether there is an indictment or no indictment (see also *Price* v. *McCarthy*, 32 C. C. A., 162, 89 Fed. Rep., 84, per Wallace, J.); and that an indictment, when offered by the prosecution, is *at best but evidence*, in no way conclusive, and in truth is but secondary evidence (which to a certain extent is admissible on such examinations); and that although the copy of an indictment may be treated as an affidavit, it is nevertheless to be judged by the same rules as other affidavits, and given weight only according to the nature and character of its averments, and the facts and circumstances which it sets forth, if any, in a manner sufficient to warrant the conclusion of probable cause to believe the accused guilty.

In the case of in re Wood, cited approvingly by Judge Brown, as above stated, Judge Bellinger states: (95 Fed., 289.)

> The statutes of Oregon have made this indictment evidence in such a case. * * * Under a similar statute in the State of California it was held in *U. S.* v. *Haskins* (3 Sawyer, 270, Fed. case No. 15322) that a copy of an indictment, if uncontradicted, is sufficient proof of probable cause to justify the commitment of the defendant. * * * And in the absence of a State

> statute of this kind, the general rule in Federal courts undoubtedly is that if the indictment contains allegations sufficient to show that a crime has been committed by the party charged, it is sufficient as a prima facie showing to order a removal if nothing else appears.

From a careful examination of the case of *United States* v. *Green* (100 Fed. Rep., 941) it will be seen that the commissioner on the hearing refused to allow the defendant to put in evidence to rebut the prima facie case established by the prosecution, and it was principally for this reason that Judge Brown refused the order of removal. Had the commissioner allowed the defense to put in evidence there would then have been "some competent regal evidence before him" *pro* and *con*, and Judge Brown would have been obliged to follow the case of *Otieza* v. *Jacobus*, *supra*, and not have interfered with the commissioner's finding of fact.

And in *Price* v. *McCarthy* (32 C. C. A., 162; 89 Fed. Rep., 84), cited by Judge Brown, a certified copy of an indictment was, at the hearing, offered in evidence, and the circuit court of appeals (Wallace and Shipman, JJ.) raised no question as to its validity or sufficiency as evidence; and again in the case of *U. S.* v. *Price* (84 Fed. Rep., 636) Judge Brown treats the indictment as evidence.

In re Dana, 68 Fed., 896.

And again in the case of In re Dana (68 Fed. Rep. at p. 896) Judge Brown says:

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> An indictment found in another district, though not primary evidence of the facts stated in it, may, however, be secondary evidence of a more or less persuasive character. It contains the finding of a body specially constituted by law to inquire into offenses; it is required to be based either upon the examination of witnesses or upon the knowledge of the grand jury itself; it is a record of their presentment or complaint and purports to be made upon oath, and is delivered to the court upon their oath to make true presentments. Beyond that jurisdiction it may, therefore, be received as any complaint on information and belief would be received, and its sufficiency should be judged by the same rules. The question of probable cause the magistrate must himself determine from all the facts ascertained by him. The judgment of a foreign grand jury is not to be a substitute for his own. If the narrative of facts contained in the indictment is clear, consistent, and unambiguous in showing the commission of the offense charged, I think it may be regarded as equivalent to a deposition of the facts ascertained by the grand jury upon the sworn examination of the witnesses whose names are indorsed on it; and, as such, sufficient evidence for the issue of the warrant of arrest under section 1014, when evidence of the facts is not conveniently attainable, and, hence, it is also sufficient for commitment if examination is waived or when the averments of the indictment are not contradicted.

Here again he treats the indictment as evidence and states that where it properly charges a crime and is

uncontradicted, it is sufficient for commitment. This case was not decided on the question as to the validity of an indictment as evidence, but upon a well-established rule that the indictment, when used in such a proceeding, must properly set forth the necessary averments to constitute a crime. In this case, at page 892, after citing many cases, Judge Brown says:

> The above are the only cases I have found in which the effect of an indictment as evidence is considered. According to them, an indictment in another district, though admissible as prima facie evidence, is not conclusive and can not shut out evidence for the defendant to show that no, offense was committed by him within the district to which removal is sought.

These excerpts would seem to indicate that Judge Brown never intended to be quoted as holding that an indictment could not, in *such a proceeding as the present*, be considered as evidence. From a close examination of his opinion in the Dana case it will be seen that he held, as a matter of law, that the indictment upon which it was sought to remove petitioner was defective. No one denies that it is within the province of a commissioner to test the indictment by reasonable tests as to whether it sufficiently charges a crime; both the commissioner at the hearing and the judge on the application for the warrant of removal may undoubtedly do this. (See In re Corning, 51 Fed. Rep., 205; In re Terrell, 51 Fed. Rep., 213, and many cases therein cited.) If the indictment will stand the test of a demurrer, then it is competent evidence. And if the indictment is competent evidence and

alleges facts sufficient to constitute crime, and the crime is properly charged therein, it is prima facie evidence, and the commissioner is the judge of the facts and his determination can not be disturbed. *U. S.* v. *Green* (108 Fed. Rep., 816); also Judge Lacombe in the case In re Price (87 Fed. Rep., 830): "Under well-settled the rules finding of the commissioner as to probable cause should not be disturbed."

(See also *Otieza* v. *Jacobus*, supra; *Price* v. *McCarthy*, supra.)

In the case at bar the Government has followed a practice well recognized for many years by the Federal courts in nearly every district in the United States, and while it may be that if it is once admitted that in *all proceedings* under section 1014 that the defendant is entitled to a *preliminary examination for the purpose of establishing probable cause*, that the defendant would be entitled as of right to introduce evidence bearing upon such question, it is sufficient to say that in the case at bat the *appellant did not avail himself of such an opportunity in any direct and proper manner.*

The following authorities are submitted upon the question that a certified copy of the indictment and proof of identity are sufficient to establish probable cause, and authorize a warrant of removal.

In the case of *U. S.* v. *Aaron Burr* (Fed. case No. 14692), Chief Justice Marshall held that on a preliminary hearing probable cause must be shown. "Proof furnishing

good reason to believe that the crime alleged has been committed by the person charged, though not sufficient for conviction will suffice for commitment." In this case the defendant was held on affidavits previously used in the State of Louisiana, in the case of Bollman and Swartwout.

In the case of *U. S.* v. *Newcomber* (Fed. case No. 15869), Judge Wilson, in the southern district of Ohio, in 1864, held that a certified copy of an indictment was enough to warrant removal.

In the case of Clark (Fed. case No. 2797), southern district of New York, in 1868, Judge Benedict, on habeas corpus and certiorari, where the United States Commissioner had issued a warrant to arrest petitioner on a charge of conspiring to defraud the United States in the eastern district of Michigan, and petitioner was arrested and brought before the commissioner and demanded an examination, and on examination the evidence consisted of a certified copy of the indictment found against the defendant in the eastern district of Michigan and proof that on said indictment a warrant had issued, held that on such a proceeding the indictment must be considered sufficient unless it is so defective in its material averments that it would be the manifest duty of a court, before it was presented by a grand jury, to decline to take action upon it.

In Federal case No. 730, in re Bailey, circuit court, district of Kansas, in 1869, Judge Love held:

> I hold, as I have always done in cases of indictment, that the prisoner should be brought before me in order

> that the fact of identity might be inquired into. * * * I hardly suppose we could look behind an indictment. * * *

In *U. S.* v. *Jacobi* (Fed. case No. 15460, district court, western district of Tenn., 1871) Withey, district judge, held:

> My opinion is also that the certified copy of the proceedings of contempt and of the attachment are sufficient to justify not only the United States in making the necessary complaint, but to authorize the issuance of a warrant of arrest by the proper officer *precisely as a certified copy of an indictment would be in any other case of crime.* * * * The papers afford sufficient evidence to authorize his imprisonment. When committed the judge would be authorized to issue a warrant to remove.

Citing *U. S.* v. *Shepard* (Fed. case No. 16273):

In Federal case No. 162, in re Alexander, district court, Massachusetts, 1871, the district attorney applied for a warrant to send the defendant to the district of Louisiana for a trial on a criminal charge, and the defendant was arraigned before the commissioner on complaint, and the only evidence of probable cause was a certified copy of an indictment returned to the circuit court of the United States for the district of Louisiana. The defendant offered no evidence and the warrant of removal was allowed by District Judge Lowell.

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In Federal case No. 15313, *U. S.* v. *Hendricks*, in 1872, circuit court in the district of South Carolina, Judge Erskine held, that a United States district judge within whose district is an offender who had fled from the district in which the offense is triable, may issue a warrant for the arrest and transportation of the offender directly to the other district without his first being committed in the district where he is found.

In Fed. Case No. 2102, in re Buell, on appeal to the circuit court of the eastern district of Missouri, from the district court, 1875, judge Dillon held that mere technical defects in an indictment should not be regarded, but a district judge who should order the removal of a prisoner when the only probable cause relied on, or shown, was an indictment, and that indictment failed to show any offense against the United States, would misconceive his duty.

In Fed. Case No. 16069, *U. S.* v. *Pope*, in the district court of Massachusetts, 1878, judge Lowell held—

> It has been seriously doubted whether a copy of an indictment is evidence in such an examination. I decided in Alexander's case, Fed. Case 162, that it is. This is a very convenient decision for the United States and a sound one, but it rests rather on long usage than on any principle of law. In extradition between the United States and other nations copies of the warrants and of the depositions upon which it was founded are made evidence (R. S., 5271); and in extraditions between the States a copy of the indictment is sufficient (R. S., 5278).

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From an examination of the foregoing cases it is plain that the courts have all dealt with a certified copy of the indictment in such a proceeding, as evidence, and in all of such cases where the indictment properly charged a crime it was held prima facie evidence. Among the later cases this has been even more positively determined.

See in re Doig (4 Fed. Rep., 193):

> The complaint on which the original warrant of arrest was issued charged the prisoner with the offense of manslaughter on the high seas, but it appears by the commitment, and it is admitted by the district attorney, that the only evidence produced to the committing magistrate was a certified copy of an indictment found by the grand jury for the district of Oregon.

In this case there was no question as to the sufficiency of such indictment as evidence.

In the case of In re Ellerbe (13 Fed. Rep., 530), where the defendant was arrested in Missouri on a warrant issued by the clerk of the circuit court of the United States for the eastern district of Arkansas, which warrant was issued by order of that court in a proceeding against petitioner for contempt, Judge McCrary says, at page 532:

> It is next insisted on behalf of petitioner that he is entitled to a hearing before he can be sent out of the district, and that he has not had such hearing as the law requires. * * * It was the duty of the district judge

> to enter into such an investigation as was necessary to enable him to determine whether the petitioner should be sent out of the district to answer the charge against him. * * * Certain it is that he had a right to inquire into the question of the prisoner's identity * * * it may, for the purpose of this case, be assumed that the district judge could inquire into the jurisdiction of the court in Arkansas to try the prisoner for the offense charged. * * * I do not think, however, that in such a case as this the district judge can go further and inquire into the guilt or innocence of the prisoner. There may be cases in which the inquiry might properly extend to an examination into the question of probable guilt; but, if so, they are cases where there has neither been a preliminary examination, nor an indictment in the district where the offense was committed, nor an order for the arrest of the prisoner by a court of the United States of competent jurisdiction and sitting in that district.

Citing opinions of Mr. Justice Miller and Judge Love (1 Wool., 422), supra.

In the case of *U. S.* v. *Rodgers* (23 Fed. Rep., 658) it is said:

> In the discretion of the judge he may take the indictment as prima facie evidence, etc.

See also *U. S.* v. *White* (25 Fed. Rep., 716).

The case of in re Wolf (27 Fed. Rep., 606) was almost identical with the case at bar. There the defendant was

indicted for a conspiracy to defraud the United States and was arrested in the State of Arkansas for removal to the District of Columbia, and the evidence offered by the Government was a certified copy of an indictment in the District of Columbia and proof of identity. In that case it was held, pp. 608 and 609:

> If the indictment contains allegations sufficient to show a crime has been committed by the party charged, it is the practice of the Federal judges to take the same as a prima facie showing that a crime has been committed at the place alleged, by the party charged; and, if nothing else appears, to order a removal of the party charged.

See also in re Graves (29 Fed. Rep., 66), citing in re Ellerbe (13 Fed. Rep., 530), and other cases.

In the case of *U. S.* v. *Fokes* (53 Fed. Rep., 13), circuit court of appeals, third circuit, it is held:

> We do not doubt that a district court may, in its discretion and in a proper case, order a warrant of removal upon an indictment alone.

This was an appeal from the decision of *U. S.* v. *Fokes* (49 Fed. Rep., 50), where an indictment was admitted as evidence.

See also in re Beshears (79 Fed. Rep., 70), which follows the above cases; also *U. S.* v. *Lee* (84 Fed. Rep., 626, at p. 627).

See also in re Bellknap (96 Fed. Rep., 614), which holds, if an indictment states an offense, it is the plain duty of the judge to order removal. Doubt should not be solved against the indictment in such a case.

Also in re Richter (100 Fed. Rep., 295), which holds:

> Undoubtedly the indictment is presumptive of probable cause if an offense within the statute is clearly stated, etc.

See also *Green* v. *Henkel* (183 U. S., 249), which holds that there must be some competent legal evidence to show that an offense has been committed over which the court in the other district had jurisdiction, and that the defendant is the individual named in the charge, and that there is probable cause for believing him guilty of the offense charged. At page 262 it holds:

> In our opinion such an indictment is prima facie good, and when a copy of it is certified by the proper officer a magistrate acting pursuant to section 1014 of the Revised Statutes is justified in treating the instrument as an indictment found by a competent grand jury.

The foregoing are substantially all of the decisions on this question in the United States courts, and with all of these decisions before him, Judge McDowell, in the United States district court in the western district of Virginia, on April 7, 1903, decided the case of *U. S.* v. *Yarborough*, in which he holds, at page 297 (122 Fed. Rep., 293):

> If the accused had been previously indicted in the district in which he is wanted, it seems to me that it would be *supra dignitate* for a commissioner (or it might be a justice of the peace) to examine anew the grounds on which a grand jury returned the indictment. Usually the accused has had an examining trial and been held over before his case is laid before the grand jury. And the indictment is a complaint nearly always founded on the testimony of witnesses, made on the oaths of the grand jurors.

In view of the foregoing decisions and quotations, it is respectfully submitted that the Government has proved a *prima facie* case by competent legal evidence, and upon the failure of the defendant to rebut said case it was the duty of the commissioner to hold the defendant for removal to the eastern district of New York.

V.

A certified copy of the indictment, together with proof of identity of the defendant, having been offered by the Government, a prima facie case of probable cause was established, and the finding of the commissioner upon this question is not subject to review on a writ of habeas corpus.

This proposition is supported by numerous authorities, but it is only necessary to refer to the opinion of Mr. Justice Peckham in the case of *Greene* v. *Henkel*, 183 U. S., 249, 261.

> Upon this writ the point to be decided is whether the judge who made the order for the removal of the defendants had jurisdiction to make it, and if he had, the question whether upon the merits he ought to have made it is not one which can be reviewed by means of the writ of *habeas corpus.*
>
> Jurisdiction upon that writ in such a proceeding as this does not extend to an examination of the evidence upon the merits. The matter for adjudication is similar to that which obtains in cases of international extradition. In such case, if there is competent legal evidence on which the commissioner might base his decision, it is enough, and the decision can not be reviewed in this way. (*Bryant v. United States*, 167 U. S., 104.) There must be some competent evidence to show that an offense has been committed over which the court in the other district had jurisdiction and that the defendant is the individual named in the charge, and that there is probable cause for believing him guilty of the offense charged.

This opinion clearly holds that if there is competent legal evidence upon which the commissioner might base his decision the question as to whether upon the merits he ought to have decided as he did is not one which can be reviewed by means of a writ of *habeas corpus.* If, therefore, the certified copy of the indictment, together with proof of the identity of the defendant, is sufficient to make out a case of probable cause, as we have shown under the preceding proposition, the finding of the commissioner that probable cause for believing the defendant guilty of

the offense charged existed would not be the subject of review here, even had the defendant upon the hearing offered evidence for the purpose of disproving the Government's prima facie case.

And while it is true that the defendant would have been entitled to submit such testimony for the consideration of the commissioner, when viewed in this aspect of the case, the commissioner obviously would not be bound to accept the testimony of the defendant in preference to the evidence submitted by the Government. In other words, if the defendant had taken the stand and testified that he was in no way concerned in the commission of the crime charged, and that he was not even in the district at the time referred to in the indictment, while the commissioner would have had the power if he believed that there was want of probable cause from such evidence to discharge the defendant, yet upon the other hand if he believed that there existed probable cause notwithstanding such testimony, his finding upon that fact could not be reviewed in a proceeding of this character. There would still, in the language of Mr. Justice Peckham, have been "competent legal evidence on which the commissioner might base his decision," and that decision would not be subject to review upon a petition, for a writ of *habeas corpus*.

Appendix D

VI.

The appellant, in the hearing before the commissioner, did not offer any competent evidence to rebut the case presented by the Government.

We have seen that, having given a case in which there is competent legal evidence upon which the commissioner might base his decision as to the existence of probable cause, that his finding upon that question can not be reviewed by a writ of habeas corpus. The facts in the case at bar show in a most convincing manner that no competent testimony was offered by the appellant at the hearing before the commissioner which tended to establish the want of probable cause. The appellant's whole contention before the commissioner was directed toward an effort to prove that the proceedings before the grand jury which returned the indictment were illegal and void, and that consequently no valid indictment had in fact been returned against George W. Beavers. A brief examination of the record will clearly disclose this fact.

(1) William Kline, sworn for the defense, testified substantially as follows (Record, pp. 85, 36, and 37):

> I am employed as a clerk in the office of Morgan & Seabury, and served a subpoena duces team upon Miss Wren for her personal appearance at the examination in this court. I saw her in the district attorney's office, in the post-office building, in the city of Brooklyn.

(2) Edmund H. Driggs, a witness for the defense, testified substantially as follows (Record, p. 68):

> Q. Were you called or subpoenaed to attend at the session of the Federal grand jury in the eastern district of New York in the month of July, 1903?
>
> A. Yes, sir.
>
> Q. Were questions put to you before that body at that time?

The commissioner sustained the Government's objection to this question.

Mr. Steuer, counsel for the appellant, stated during the examination of this witness, as follows:

> We do propose to show what transpired before that grand jury so as to show that there was not any evidence upon which that body could have found an indictment, a legal, valid, lawful indictment against George W. Beavers. We have no other purpose in calling this witness or any other witness who appeared before the grand jury. For that we have the authority of this court in well-considered cases. (Record, pp. 68, 69.)

And again, Mr. Steuer said:

> What I proposed to show was that the testimony given by the witness was illegal, incompetent and irrelevant, and improperly received, and that it

> in no way gave a foundation for the finding by the grand jury of any fact attempted to be set out in that indictment, and I understand that you refuse to permit me to show by this witness. (Record, p. 69.)

(3) Harry F. Burns, a witness for the defense, was called, and after certain preliminary questions was asked whether questions were put to him before the grand jury; which question he was not permitted to answer.

Mr. Steuer again said (record, p. 70):

> And we propose to show by this witness that he gave no testimony upon which, either separately or taken in conjunction with all the other testimony before that body, a legal, lawful, or valid indictment could be found against George W. Beavers; and we also propose to show that such testimony as was given by him before that body was illegal, incompetent, irrelevant, and immaterial to the issue then before that body.

Subsequently the same character of testimony was sought to be elicited from each and all of the other witnesses called in behalf of the defendant:

(4) George F. Miller (p. 70).

(5) Amy Wren, a clerk in the district attorney's office (Record, p. 74).

(6) William J. Youngs, United States attorney, Brooklyn (Record, p. 80).

(7) Frank E. Little, post-office inspector (Record, p. 82).

(8) John F. Oldfield, post-office inspector (Record, p. 91).

It will be observed that all of this testimony sought to be produced in behalf of the defendant, and which the commissioner declined to receive, tended *directly* to impeach the action of the grand jury for the eastern district of New York in finding the indictment; and while such testimony has been received by the court in which the indictment was found, as a basis for a motion to quash the indictment, it is manifest that such testimony ought not to be heard by a United States commissioner who has no power to quash the indictment. The theory of the defense is that such testimony was competent for the purpose of thus indirectly proving a want of probable cause.

Upon that proposition we rely again upon the authority of *Greene* v. *Henkel*, 183 U. S., 249, 261, in which Mr. Justice Peckham said:

> We do not think that under this statute the commissioner would be warranted in taking evidence in regard to the organization of the grand jury which found the indictment, as claimed by the defendants. The indictment is valid on its face; purports to have been found by a grand jury acting in fact as such at a regular term of a district court of the United States, presided over by one of its judges, and hearing testimony in the ordinary way. In our opinion, such an

> indictment is *prima facie* good, and when a copy of it is certified by the proper officer, a magistrate, acting pursuant to section 1014 of the Revised Statutes, is justified in treating the instrument as an indictment found by a competent grand jury, and is not compelled *or authorized* to go into evidence which may show or tend to show violations of the United States statutes in the drawing of the jurors composing the grand jury which found the indictment.
>
> We agree with the district judge that matters of that nature are to be dealt with in the court where the indictment is found, and we intimate no opinion upon the merits of those questions. Whether the defendants have waived the right to raise them, or whether they could waive the same, are also questions that are not before us. They must be raised before and decided by the United States court sitting in the southern district of Georgia, in the first instance, and we express no opinion as to their validity.

So in the case at bar, the question as to whether there was any competent legal testimony presented to the grand jury for the eastern district of New York upon which this indictment is based, is a matter to be dealt with in the court where the indictment was found, and must be raised before and decided by the United States court sitting in the eastern district of New York.

The cases cited by appellant in his brief (p. 28) are all cases of this character, and arose on a motion to quash the indictment before the court in which the indictment was found.

But if we admit, for the purposes of the argument, that the commissioner would have been justified under the law in receiving such testimony, and that he improperly excluded it, such action upon his part is not sufficient to raise a jurisdictional question. It was at most an error of law which can not be reviewed upon a writ of *habeas corpus.* Suppose the commissioner upon the hearing had excluded certain evidence offered by the defendant which this court might regard as perfectly competent testimony, it certainly could not be successfully maintained that such a ruling by the commissioner would be subject to review upon a writ of *habeas corpus* and a writ of *certiorari* ancillary thereto.

CONCLUSION.

While the Government contends that section 1014 of the Revised Statutes, when properly construed in a case in which an indictment has been found, was intended to furnish the Government with a convenient and summary method for securing the appearance of the defendant before the proper United States court for trial without first resorting to a preliminary examination for the purpose of ascertaining the existence of probable cause, it is of course unnecessary for the Government in this case to rely upon that contention if the other proposition be true, namely, that a certified copy of the indictment and proof of identity of the defendant are sufficient to make out a prima facie case that an offense has been committed over which the court in the other district had jurisdiction, and that probable cause exists for believing the defendant guilty of the offense charged.

This proposition the Government especially relies upon and respectfully submits:

First. That the commissioner and the district judge who issued his warrant of removal, having each determined that probable cause existed, that so long as there was some competent evidence upon which such a finding could be based, that this court ought not to review that question by means of a writ of habeas corpus.

Second. That the evidence offered by the defendant, and rejected by the commissioner, clearly showed that it was not competent evidence for the purpose of rebutting the prima facie case of the Government establishing the existence of probable cause.

Third. Even though the evidence offered by the defendant and rejected by the commissioner was competent, that the ruling of the commissioner was a mere error of law and not reviewable here.

Respectfully submitted.

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Assistant Attorney-General.