

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA:

VS.

HAROLD F. CHORNEY

:
: C.R. NO. 92-099 P
: DATE: MARCH 9, 1994
:

TRANSCRIPT OF PROCEEDINGS IN THE
ABOVE-ENTITLED ACTION ON MARCH 9, 1994, BEFORE THE
HONORABLE RAYMOND J. PETTINE, SENIOR JUDGE.

APPEARANCES

For the Government:

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For the Defendant:

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1 MARCH 9, 1994

2 THE COURT: Thank you. Please be seated.
3 Good morning, Counselors.

4 MR. POSNER: Good morning, your Honor.

5 MR. LUTES: Good morning, your Honor.

6 THE COURT: All right. We are ready to
7 proceed, are we?

8 MR. POSNER: Yes, your Honor.

9 MR. LUTES: Yes, your Honor.

10 THE COURT: All right.

11 MR. POSNER: Your Honor, perhaps the best
12 way to approach this is to start off with the
13 presentence report computation and go from there.
14 Under the computation made in the presentence report,
15 six points was assessed for the base level. The
16 amount of loss was assessed in the presentence report
17 at \$1,111,865.00 or another nine points; more than
18 minimum planning, two points or 17 points were
19 specifically assessed in the presentence report.

20 Since that time as your Honor knows, we've
21 had hearings in connection with reducing the amount
22 of the loss by additional assets of Cumberland. And
23 your Honor may recall a week ago Monday we heard from
24 various witnesses and your Honor made certain
25 determinations.

1 Before we go any further, I think it is
2 appropriate, respectfully that I'd like to know what
3 your Honor has decided relative to the reduction
4 because if it reaches a certain point or it's only
5 within a certain point, and let's say it amounts to
6 one point less in the computation for the loss, if
7 that be the situation, the government will not press
8 its point about whether or not any of this should be
9 involved in -- in reducing the loss. In other words,
10 does Eastland have a lien or doesn't have a lien?

11 If we're talking about one point, your
12 Honor, if that be the case, the government would not
13 press this issue; then we can reduce it by one point
14 and go forward from that point on. I don't know what
15 your Honor has decided relative to the silver dollar
16 coins that are in issue, and the bulk foreign coins
17 and currency that we heard testimony about a week ago
18 Monday.

19 THE COURT: I'm not going to tell you.

20 MR. POSNER: Well --

21 THE COURT: Mr. Posner, what are we doing
22 here, are we going to have some new method of
23 sentencing in this Court? You present your case, I
24 will hear from the defense counsel and then I'll make
25 a ruling.

1 MR. POSNER: Well, the problem is I don't
2 know at this point whether the government is going to
3 press its objection to any of this being considered
4 as part of the loss to the bank. Because I don't
5 know what your Honor's decision on that issue is.

6 THE COURT: Well --

7 MR. POSNER: If we do, it changes the
8 whole complexion of this hearing because we would
9 have to get into the issue of whether or not your
10 Honor has the --

11 THE COURT: Look, Mr. Posner, place your
12 objections to the presentence report on the record
13 and I'll proceed to the defense.

14 MR. POSNER: All right. It is the
15 government's position, has been all along, your
16 Honor, that because there is a dispute as to whether
17 or not these other assets of Cumberland are liened to
18 Eastland or not, that they should not be considered.
19 That has been the government's position all along.
20 If your Honor decides against that position, and we
21 get back to what is the value of the other assets.
22 It is the government's contention that the present
23 date should be used for valuation, that is, Mr.
24 Hermann's valuation of \$284,401.00, or in the
25 alternative August 17th, 1990, when the trustee in

1 bankruptcy took over the assets from Mr. Chorney who
2 was operating as debtor in possession. His valuation
3 as of that date was \$336,951.00. And I believe we
4 agreed the date would determine the value of the
5 silver dollars. U.S. currency we've agreed is
6 115,000. The government's position on the bulk of
7 foreign coins and currency is \$31,455.00.

8 THE COURT: Hold it here. Betty, will you
9 please see if Virginia has finished that typing for
10 me. Will you hold up a minute please, Mr. Posner?

11 MR. POSNER: Certainly.

12 (P A U S E)

13 THE COURT: What are we doing here? Are
14 we drinking anything but water in this courtroom?

15 MR. LUTES: No, your Honor.

16 THE COURT: All right. Mr. Posner, will
17 you start again on this computation you made.

18 MR. POSNER: The silver dollar coins, a
19 decision has to be made by your Honor as to which
20 date we are going to use. The date will determine
21 the value placed upon it. The parties agreed that
22 whichever date is used, we have a valuation for each
23 of those dates. It's the government's position that
24 the date that should be used is the current date,
25 that is, February of this year which would place a

1 value of \$284,401.00 as arrived at by Mr. Hermann.

2 In the alternative the government argues
3 that if the Court is unwilling to use that date, that
4 it should use 8/17 or August 17th, 1990, which is the
5 date that the trustee in bankruptcy took possession
6 of all of these assets from the debtor in possession,
7 that is, the defendant. At that date, the value has
8 been agreed upon for these coins to be \$336,951.00.
9 The U.S. currency has been agreed to by the parties
10 to be \$115,000.00.

11 The bulk coins, there's a dispute. The
12 government says the value should be \$31,455.00;
13 defendant's witness talked about \$200,000.00
14 valuation. The stamps, your Honor has already
15 decided the U.S. stamps to be \$50,950.00.

16 THE COURT: Did you say \$990.00 --

17 MR. POSNER: Yes.

18 THE COURT: -- I thought it was just
19 \$50,000.00?

20 MR. POSNER: No, \$50,990.00.

21 THE COURT: All right. Go ahead.

22 MR. POSNER: And the parties have agreed
23 that for the trading cards there will be another
24 \$5,000.00, and for jewelry, another \$3,000.00.

25 THE COURT: Okay.

1 MR. POSNER: Those figures come out --

2 THE COURT: How about the U.S. coin proof
3 sets and so forth?

4 MR. POSNER: That's -- that was part of --
5 that was part of Mr. Hermann's evaluation, your
6 Honor. There is no separate figure for that. Mr.
7 Chorney has put up a separate figure for that. That
8 was all included in Mr. Hermann's testimony, all of
9 that.

10 THE COURT: As I understand it, as to that
11 amount of money, it was agreed the last time we
12 talked, \$13,453.10 could be given to be used as the
13 valuation of those items.

14 MR. POSNER: No. That figure would be
15 added to the defendant's appraisal from 590 to 604.
16 The defendant wanted added to his appraised figure
17 bringing it up to 604,095.

18 THE COURT: What do you mean to his
19 appraised figure, which particular item?

20 MR. POSNER: The U.S. silver dollars, your
21 Honor.

22 THE COURT: We have two figures there, one
23 is one date and one is another date.

24 MR. POSNER: For the May '89 figure, the
25 defendant originally talked about 590,602.30, then

1 asked for another 13,000 plus to be added to that 590
2 bringing it up to 604,095; that's the defendant's
3 figure for May '89.

4 THE COURT: The fact is the defendant is
5 asking for \$13,453.00 credit on those U.S. coins and
6 proof sets.

7 MR. POSNER: The government's figure
8 includes that, your Honor.

9 THE COURT: Which figure includes it?

10 MR. POSNER: Both of them, 284,401 or
11 336,951, depending on the date you use. The
12 government's figure is all inclusive.

13 THE COURT: I'll hear from the defendant
14 on this. I'm not sure that -- go ahead. What else?

15 MR. POSNER: All right. Now, if you use
16 --

17 THE COURT: We have the -- how about the
18 7,820 coins valued at \$1,388,135.00?

19 MR. POSNER: That comes off the two and a
20 half million.

21 THE COURT: Of course.

22 MR. POSNER: Your Honor has already
23 decided that.

24 THE COURT: Right.

25 MR. POSNER: That leaves a balance after

1 we take that off, of \$1,111,865.00 after you take off
2 the one million three hundred eighty-eight plus
3 thousand dollars from the two and a half.

4 THE COURT: Well, okay. Go ahead. This
5 \$13,453.00 I find very troublesome. You say its
6 included in the three -- if I took your figure --

7 MR. POSNER: That's correct.

8 THE COURT: -- whether it be the
9 \$336,951.00 or the other figure --

10 MR. POSNER: Two hundred eighty-four.

11 THE COURT: -- it would be included in
12 that figure so, therefore, if it was added on it
13 would be double counting.

14 MR. POSNER: That's correct.

15 THE COURT: All right. Go ahead.

16 MR. POSNER: All right. If we use -- I
17 just did a computation using the August 17th, 1990,
18 silver dollar figure using the bulk figure of the
19 government thirty-one thousand four hundred
20 fifty-five, I added all those items up, silver
21 dollars, the currency, the bulk foreign coins and
22 currency, the stamps, the trading cards, the jewelry,
23 I came up with \$542,396.00; that would have to be
24 subtracted from \$1,111,865.00 leaving a balance of
25 \$569,469.00.

1 THE COURT: Yes.

2 MR. POSNER: Against that are two figure
3 that the government feels should be taken away from
4 the five hundred forty-two thousand for all these
5 items.

6 THE COURT: Five hundred forty-two
7 thousand, I thought you said five hundred sixty-nine
8 thousand?

9 MR. POSNER: Well, that's the balance.

10 THE COURT: All right.

11 MR. POSNER: All right. Or if you want to
12 add to it, if you will, or reduce that \$542,000.00
13 credit by two figures. One is the super priority
14 already decided by the Bankruptcy Court of
15 \$149,580.00. Your Honor has documents from Fleet
16 Bank which took over as successor to Eastland. That
17 money was advanced by Eastland on the assurance and
18 the order of the Bankruptcy Court, that would come
19 off the top before anything else was paid. That
20 money was advanced to the trustee so the trustee
21 could function as trustee; money for expenses to
22 operate. The remaining balance without any interest,
23 just the principal, is \$149,580.00. There is an
24 order already in effect that's been filed with the
25 Court by the Bankruptcy Court saying, that money gets

1 paid before anything else, that specific figure gets
2 paid.

3 So that should -- instead of five hundred
4 sixty-nine thousand, you add that back, I didn't do
5 it that way, but it's about \$720,000.00 now, that is
6 the loss. There is another figure, but if it stays
7 at seven hundred twenty thousand, the other figure is
8 Mr. Weingarten's as examiner, he has a bill of
9 \$250,000.00 before the Bankruptcy Court. That has
10 not been acted upon yet. That's not -- has not been
11 approved in total. Some or all of that is going to
12 be approved down the road because that's his bill.
13 But there is no question about the \$149,580.00. So
14 that would leave us with over \$700,000.00.

15 THE COURT: Look, Mr. Posner, whether it's
16 \$700,000.00 --

17 MR. POSNER: Right, being the loss.

18 THE COURT: -- or \$510,000.00, what's the
19 difference in the sentencing?

20 MR. POSNER: One point. From nine points
21 to eight points. Because the guideline is five
22 hundred thousand to a million, eight points. Over a
23 million, nine points.

24 THE COURT: So I say \$700,000.00 or
25 \$500,000.00 isn't going to make any difference in the

1 sentencing?

2 MR. POSNER: No. But I want to make sure
3 it's over five, your Honor. That's why I'm bringing
4 up the one hundred forty-nine thousand. Five hundred
5 sixty-nine thousand is approaching that \$500,000.00
6 line. That's the only reason I bring it up, and it
7 is as I say, a legitimate expense that comes off the
8 top.

9 So that would make it, if that be the
10 case, that would make it instead of 17, that would
11 make it 16 points. All right?

12 THE COURT: All right. Now, you are
13 saying that one of these last two figures that you
14 are arguing should be added. Let me have them.

15 MR. POSNER: The argument?

16 THE COURT: No, the last two figures.

17 MR. POSNER: The last two figures,
18 \$149,580.00 that's owed to Fleet Bank. One hundred
19 forty-nine thousand five hundred eighty.

20 THE COURT: What does that represent?

21 MR. POSNER: That is money that was
22 advanced by Eastland Bank to the trustee in order for
23 the trustee to be able to operate, to dispose of the
24 estate and to operate in bankruptcy.

25 THE COURT: That was, that's operating

1 costs?

2 MR. POSNER: Yes.

3 THE COURT: And what else?

4 MR. POSNER: The other is \$250,000.00 to
5 Michael Weingarten, the court-appointed examiner.
6 Two hundred fifty thousand even.

7 THE COURT: Who appointed him examiner?

8 MR. POSNER: The Bankruptcy Court.

9 THE COURT: All right. Okay.

10 MR. POSNER: So if there is a one point
11 difference, we are down to 16 from 17; that's in the
12 presentence report. The government has also raised
13 some other points, your Honor, in its sentencing
14 memorandum. The government asks that your Honor add
15 two points --

16 THE COURT: Go ahead.

17 MR. POSNER: -- two points for obstruction
18 of justice. It is the government's contention that
19 when Mr. Chorney appeared before the grand jury on
20 August 20th, 1992, he committed perjury while he was
21 testifying under oath. He testified William Tebbetts
22 owned Mayflower Coin and Stamp Company. He did not.
23 He testified that Tebbetts was not on his,
24 Cumberland's payroll. In fact, Tebbetts testified
25 and there's documents to the effect that, in fact, he

1 was on the payroll and was being paid every week by
2 Mr. Chorney.

3 He testified he couldn't recall where the
4 money came from to purchase Mayflower. That money,
5 there's testimony that money came from Mr. Chorney.
6 And when he -- he answered the question as to whether
7 any agreements had been signed between himself and
8 Tebbetts in connection with Mayflower, he denied such
9 agreements. The 3C1.1 permits an upward adjustment
10 for conduct as such as committing suborning or
11 attempting to suborn perjury.

12 THE COURT: Okay. You say perjury?

13 MR. POSNER: Yes, your Honor.

14 THE COURT: You know the proof that's
15 required to prove perjury?

16 MR. POSNER: Yes, sir.

17 THE COURT: Where do you have it here? A
18 man has a certain position that he has taken with
19 reference to his case, maybe with reference to a
20 defense and immediately the prosecution wants to say
21 perjury. I hear this time and time again. A man
22 gets up to defend himself in court, perjury.

23 MR. POSNER: This is not court, this is
24 before the grand jury.

25 THE COURT: I understand it's before the

1 grand jury, but you say he committed perjury and I
2 hold you to the proof of perjury.

3 MR. POSNER: All right. And what I'm
4 saying, your Honor, is, that he provided false
5 testimony to the grand jury. He denied any
6 connection with Mr. Tebbetts.

7 THE COURT: How are you going to prove
8 otherwise?

9 MR. POSNER: You have two documents that
10 are in evidence, a handwritten document by Mr.
11 Chorney himself plus a typed document. You have
12 testimony by the secretary who typed it. It was done
13 at Mr. Chorney's direction. Mr. Tebbetts --

14 THE COURT: I heard the testimony.

15 MR. POSNER: That's right.

16 THE COURT: And I heard the
17 cross-examination of those witnesses. Go ahead, Mr.
18 Posner. What else do you want to put before the
19 Court?

20 MR. POSNER: You mean after this or --

21 THE COURT: Whatever you have. Just let
22 me have it.

23 MR. POSNER: All right. It is the
24 government's position that between these documents
25 and the testimony there is no question this was all

1 part of the original cover up of material facts,
2 namely in connection between Mr. Tebbetts whose name
3 appeared on an appraisal submitted to the bank and
4 Mr. Chorney. And this is all part of the same
5 cover-up and lying to the grand jury about his
6 connection to Mr. Tebbetts which is material to this
7 whole, the whole case and the conviction for which
8 Mr. Chorney is presently before the Court.

9 It is the Government's contention this
10 evidence indicates that Mr. Chorney's testimony
11 before the grand jury is not the result of confusion,
12 mistake or faulty memory, but was a deliberate
13 attempt on his part to cover up his connection with
14 Mr. Tebbetts throughout this entire situation with
15 the bank, the financial statements containing the
16 appraisal by Mr. Tebbetts and the fact that Mr.
17 Tebbetts was not an independent appraiser.

18 THE COURT: If Tebbetts was telling the
19 truth. Go ahead.

20 MR. POSNER: Well, the jury thought so.
21 We have a guilty verdict, your Honor.

22 THE COURT: I'm deciding whether there's
23 perjury here, not the jury.

24 MR. POSNER: I understand that. I
25 understand that.

1 THE COURT: I heard Tebbetts' testimony.
2 Go ahead, Mr. Posner.

3 MR. POSNER: On the next issue is the
4 issue of loss of confidence in an important
5 institution. The government feels that that should
6 be another two points for that, that the loss of
7 Cumberland was something that substantially
8 contributed to the downfall of the bank. We have Mr.
9 McQueen's affidavit to the effect that, or stating
10 that the loss of this two and a half million dollars,
11 the interest on the two and a half million dollars,
12 the money the bank spent in order to defend itself
13 and in order to prosecute the bankruptcy all
14 contributed to the bank's demise.

15 I'm not saying it was the only reason for
16 the bank's demise, your Honor, I'm simply saying it
17 was a contributing factor. And these things resulted
18 from Mr. Chorney's failure to pay back the loan. And
19 as I did in my sentencing memorandum, I talked about
20 under 2F1.1, comment N-10, note 10, the defendant's
21 conduct caused a loss of confidence in an important
22 institution, namely a bank or the bank financial
23 institution.

24 And I have reviewed in there the whole
25 history of the FIRREA Act, the Financial Institution

1 Act, your Honor, and I would indicate to the Court
2 that even though there is no direct evidence that his
3 own conduct specifically caused a loss of confidence,
4 there is a First Circuit case, U.S. v. Roe that says
5 that no such evidence is required, that his act in
6 the specific instance -- that we don't have to prove
7 this specifically caused a loss of confidence. This
8 case is one of a pattern of behavior involving
9 financial institutions that have been going on in
10 Rhode Island the last four, five years and
11 contributed to a loss of confidence. The bank had to
12 close, a lot of people lost their jobs, etcetera.

13 THE COURT: You are certainly not saying,
14 Mr. Posner, that it was this incident in isolation --

15 MR. POSNER: No.

16 THE COURT: -- that suddenly caused
17 Eastland to collapse?

18 MR. POSNER: No, I'm not saying that.

19 THE COURT: Of course not. You wouldn't
20 dare say that.

21 MR. POSNER: I'm not saying that.

22 THE COURT: And you don't even know what
23 percentage of contribution it actually made to the
24 collapse of the bank because you don't know all the
25 intricacies of what really caused Eastland to

1 collapse. All right. Go ahead, Mr. Posner.

2 MR. POSNER: I am suggesting to your Honor
3 that this was a contributing factor. I don't think
4 the government has to prove a percentage or that this
5 was a ten percent cause or a fifty percent cause.

6 THE COURT: You're saying it was a
7 contributing factor. Go ahead.

8 MR. POSNER: Another thing that the
9 government is asking the Court to do is to depart
10 from category one to category two because this
11 defendant's past criminal conduct does not adequately
12 reflect his behavior. Under 4A1.3 --

13 THE COURT: He has a criminal history
14 category of one, that's unassailable.

15 MR. POSNER: Well, the government is
16 suggesting to, your Honor, that under 4A1.3, prior
17 similar misconduct established by a civil
18 adjudication or by a failure to comply with an
19 administrative order, is grounds for departure
20 upward.

21 THE COURT: I can tell you right now I
22 reject that position.

23 MR. POSNER: I understand. Okay. I
24 merely wish to put on the record, your Honor, that in
25 the bankruptcy proceeding there were outstanding

1 orders that this defendant failed to heed, failed to
2 comply with. There have been findings in that regard
3 by the Bankruptcy Court, by the bankruptcy judge.

4 THE COURT: You are taking the civil
5 proceedings and you are converting it into a criminal
6 proceeding here. Oh, dear. Let's go onto your next
7 point.

8 MR. POSNER: It says that right in the
9 guidelines, your Honor, I'm quoting.

10 THE COURT: That's how you interpret the
11 guidelines. Let's go onto your next point, will you
12 please?

13 MR. POSNER: Okay. And the last point the
14 government would make, your Honor, is that whatever
15 the guideline level the Court decides on, the
16 government would ask the Court to sentence the
17 defendant at the top of the guideline range as
18 opposed to the middle or the bottom.

19 THE COURT: So what are you recommending
20 the sentence should be here? What do you conclude?

21 MR. POSNER: Well, your Honor has to
22 decide on the issues that I have raised.

23 THE COURT: Based on your position what do
24 you conclude?

25 MR. POSNER: Oh, I'm sorry. A level 20,

1 category two, your Honor.

2 THE COURT: Category two?

3 MR. POSNER: Well, I understand your
4 Honor's position. You asked me what the government
5 is --

6 THE COURT: This is a wonderful display of
7 how the sentencing guidelines work, and how it's
8 attempting to take away from the judges the
9 sentencing process and put it in the hands of the
10 prosecutors. Go ahead, Mr. Posner. So what is the
11 sentence that you would impose in this case?

12 MR. POSNER: Twenty, category two is a
13 level of 37 to 46 months; and under that the
14 government recommends 46 months, your Honor.

15 THE COURT: All right. Mr. Lutes. While
16 it's fresh in my mind I want you to comment on one
17 thing in the computation here. The stamps were
18 agreed at \$50.990.00?

19 MR. LUTES: Correct.

20 THE COURT: All right. And I've got the
21 transcript, the last time we met, and this case has
22 been changing time and time again as we have been
23 going on. This has been a six-month process and here
24 on the day of sentencing we still are debating
25 values. Now, U.S. coins proof sets and so forth,

1 specifically stated the last time we were here, it
2 was agreed upon they had a value of \$13,453.00.

3 MR. LUTES: That's correct, your Honor.

4 THE COURT: That's correct. Now, Mr.
5 Posner is contending that that amount is included in
6 the value of the eight thousand six hundred forty-one
7 silver dollars. Do you agree to that?

8 MR. LUTES: In the government's valuation,
9 that the figure is included, that's correct.

10 THE COURT: So that if I accepted the
11 government's valuation, I would not add or deduct
12 from the economic loss, that is, the amount of the
13 loan, that \$13,453.00 because it's included in the
14 three -- if I took the three hundred thirty-six
15 thousand, it would be included in that.

16 MR. LUTES: That's correct, although, I
17 would note that we don't know exactly what the
18 government's valuation of these items was, but that
19 valuation was in fact --

20 THE COURT: Included.

21 MR. LUTES: -- included, correct.

22 THE COURT: All right. Go ahead.

23 MR. LUTES: Thank you, your Honor.

24 THE COURT: Hold on a minute. Let me make
25 sure. All right. Now, the government is also

1 claiming that \$149,480.00, which was advanced by
2 Eastland to the trustee as operating costs should be
3 assessed against your client as well as \$250,000.00
4 paid to Michael Weingarten. All right.

5 MR. LUTES: Yes, your Honor. The
6 defendant disputes that, your Honor.

7 THE COURT: Well, in your presentation I
8 just want to point these out to cover these two
9 points.

10 MR. LUTES: Yes, I will, your Honor.

11 THE COURT: And this category two. Are
12 you prepared to answer to that too?

13 MR. LUTES: Yes, certainly, your Honor.

14 THE COURT: All right. I'll hear you.

15 MR. LUTES: Thank you, your Honor.

16 THE COURT: Let me, so that we don't have
17 any problems, let me go through the mechanics. And
18 my question to you would be, are you now going to
19 present what you find as factual inaccuracies in the
20 presentence report?

21 MR. LUTES: Yes.

22 THE COURT: Okay. I'll hear those
23 findings and I would like those recorded.

24 MR. LUTES: Thank you, your Honor. Your
25 Honor, with respect to this case, as you know it's

1 been a very long and difficult case, and it's been
2 very complex and hard to get a handle on. In my
3 comments here this morning I would like to, just as
4 briefly as I can, give you the defendant's version of
5 how your Honor should compute the sentence that's
6 applicable in this case.

7 The presentence report I believe was
8 actually compiled prior to your Honor making certain
9 rulings that I think are very relevant in determining
10 this sentence. Specifically, your Honor's ruling
11 allowing us to have the value of the other collateral
12 appraised.

13 This information was not available to the
14 presentence officer when the report was compiled.
15 Therefore, that information is actually lacking from
16 the report. And, your Honor, I would like to
17 incorporate by reference the objection that I did
18 file to the presentence report pointing out what we
19 felt at that point in time were the inaccuracies in
20 the report. And for purposes of this morning, I
21 would like to argue to your Honor as to how the loss
22 in this case should be valued.

23 First of all, the biggest issue your Honor
24 has to decide is as to what date the valuation of
25 loss should be used. The defense has contended that

1 the date of May 1989 is the applicable date. And
2 your Honor, as you will recall, the seven thousand
3 eight hundred twenty coins that were immediately
4 within the possession of Eastland Bank, the value of
5 those coins was stipulated to by the government and
6 the defense as \$1,388,135.00. That was the
7 government's valuation of those coins as of May 30,
8 1989.

9 And the defense's point is that all the
10 collateral should be valued as of the same date. It
11 only makes logical sense to do that when you consider
12 the nature of this inventory.

13 Your Honor heard abundant testimony
14 regarding the nature of these assets, how they rise
15 and fall in value, how grading standards fluctuate
16 over time, how there is a very subjective nature of
17 this grading process.

18 For consistency's sake, your Honor, the
19 defense contends that the value of the collateral
20 should all be determined as of the same date as
21 opposed to saying we are going to value this
22 collateral as of this date; we are going to value
23 this collateral as of another date. And, your Honor,
24 the difference between May of 1989 and February of
25 1994 is almost five years. The testimony from the

1 witness stand during the trial was that the
2 marketplace has declined during that period of time.
3 Therefore, it's not fair to hold the defendant
4 responsible for a decline in the overall marketplace
5 when the guidelines say the consequential damages due
6 to the unforeseeability of those consequential
7 damages should not be considered in determining the
8 sentence.

9 It's the defendant's viewpoint that the
10 sentence should be determined by, if you will,
11 figuratively speaking, taking a snapshot of what the
12 value of the collateral was as of a certain date.
13 And the guidelines seem to say, and I think the
14 government would at least partially agree that that
15 value should be determined as of May of 1989.

16 Assuming for a second the logic of the
17 defendant's argument that it should all be determined
18 as of May of 1989, the reason why you would not
19 consider some of these issues of the \$149,580.00
20 loaned by Fleet Bank is because that constitutes
21 consequential damages and the guidelines very
22 specifically state, I think it's 2F1.1 in application
23 note 7(C), that you cannot consider consequential
24 damages in a case like this.

25 THE COURT: Now what figures are you

1 referring to, Mr. Lutes?

2 MR. LUTES: Well --

3 THE COURT: Are you referring to the money
4 advanced by Eastland and the money paid to
5 Weingarten?

6 MR. LUTES: That's correct, your Honor.
7 First of all, your Honor, Mr. Weingarten has not been
8 paid. He's put in a bill for two hundred fifty
9 thousand. He can be paid all or nothing of that
10 figure, and it's speculative. That's why I asked
11 your Honor not to consider that.

12 But with respect to the priority debt of
13 \$149,580.00, that was not even loaned until I believe
14 it was 1990 or 1991, well after Cumberland was even
15 out of business. And that constitutes in defense's
16 position a consequential damage.

17 The guidelines say you can't consider the
18 interest this loan might have generated over the past
19 five years, when considering the face value of the
20 loan of two and a half million dollars interest on
21 that loan over five years would add up to a very
22 substantial figure.

23 Now, if the guidelines say you cannot
24 consider that or hold that against this defendant, it
25 seems logical to assume also that you can't include

1 attorney's fees, loans that the trustee might take
2 out to administer the estate, things of that nature
3 because they constitute consequential damages, things
4 that occurred after the default of the loan that were
5 not foreseeable by this defendant. Your Honor,
6 that's the primary reason why the defense contends
7 you should not consider any of those values. You
8 should value all the collateral of Cumberland as of
9 May of 1989 just as you did with the seven thousand
10 eight hundred twenty coins, and that's why the
11 defense suggests you should honor Mr. Moffatt's
12 valuation of the other U.S. silver dollars of
13 \$590,602.30 because that's valued as of a date in May
14 of 1989, that is -- is within a week or two of this
15 valuation of a million three for the other coins.

16 The other figures, your Honor, the major
17 figures, the U.S. currency, stamps, trading cards,
18 we've all agreed to that, I'm not going to belabor
19 that point; the jewelry for \$3,000.00. The defense
20 contends that the proof sets, exnumia, other coins,
21 of \$13,453.20 should be added onto the valuation of
22 the silver dollar inventory because, first of all,
23 these items existed. And second of all, Mr. Hermann
24 in the government's appraisal never even ascribed a
25 value to these items. He simply included that in his

1 gross valuation of inventory.

2 The biggest area I guess remaining in
3 valuation, your Honor, is with respect to the foreign
4 currency and the foreign coinage. And your Honor
5 heard two individuals testify before you last week,
6 Mr. Hermann of Ramapo and Mr. Balbaton for the
7 defense. And I think, your Honor, my
8 cross-examination of Mr. Hermann he indicated that he
9 has essentially no experience in this area, he's not
10 a member of any professional organizations in this
11 area, he's never bought or sold these items.
12 Whereas, the defense expert, Mr. Balbaton has been
13 working in this field for over 30 years, he actively
14 buys and sells these items. He is a member of
15 numerous professional organizations, he's written in
16 this area. He has much more expertise than Mr.
17 Hermann.

18 Mr. Hermann stated that all he did was, he
19 just weighed everything up and ascribed a value of
20 \$3.00 a pound to it as a wholesale figure that items
21 could be sold for. And he indicated that he didn't
22 know what value to put upon it, but he called around
23 and asked other people who were knowledgeable as to
24 what value to ascribe to it. He didn't call Mr.
25 Balbaton, but he called other individuals and came up

1 with \$3.00 a pound.

2 Mr. Balbaton, while I'll agree did not
3 take the time to individually grade each of the more
4 than two million coins of foreign coins or the over
5 one million items of foreign currency, which he
6 indicated was the proper way of doing it, he
7 indicated that he's never seen these items weighed up
8 on a per pound basis, and that by doing this you do a
9 great injustice to the inventory because you don't
10 ascribe any value to the inventory itself. He
11 mentioned that Mr. Hermann didn't even use a gram
12 scale or any type of accurate scale; he simply put on
13 it a bathroom scale.

14 Your Honor, the defense contends that the
15 figure of \$31,455.00 given by the government as a
16 fair value for the foreign coinage and currency is
17 grossly inadequate. And that Mr. Balbaton indicated
18 that a fair retail value of the foreign inventory
19 based upon what he saw might be in excess of six or
20 eight hundred thousand dollars, but using a fair
21 figure of perhaps 30 percent of that as a wholesale
22 figure, he came up with a total figure of
23 \$200,000.00, your Honor. I would ask your Honor to
24 credit that.

25 And accepting those figures, your Honor,

1 the defense comes up with at this point, and I'm not
2 quite done yet, but at this point of a loss of
3 \$133,739.50. With respect to that shortfall, your
4 Honor, I would ask your Honor to consider an argument
5 I made in one of the memoranda I filed recently with
6 the Court, and that is the fact that if you accept
7 the argument that the value of the collateral should
8 be determined as of May of 1989, at that point in
9 time Cumberland possessed not only items in its own
10 inventory and items at Eastland Bank, but there are
11 also thousands of coins at People's Bank in Indiana,
12 there are coins that were later sold by Christie's
13 and Bowers and Merena at auctions that realized a
14 value far below what their fair market value was,
15 your Honor.

16 And the defense attempted to establish the
17 point during the trial of this case, that the manner
18 in which these assets were sold was not commercially
19 reasonable. You'll recall testimony, your Honor,
20 that the Christie's sale, the government made much of
21 this Christie's auction, was not even advertised in
22 the Coin World periodical which is one of the
23 standard publications in the coin field. And Mr.
24 Moffatt testified that the same weekend that the
25 Christie's sale or auction took place, he was calling

1 or acting as the auctioneer for a small auction in
2 Connecticut, which was far smaller than the
3 Christie's sale which was advertised in Coin World
4 because that's a reasonable way of attracting
5 interested buyers for these items.

6 He also testified that the manner in which
7 these lots were set up in lots of 200 and 300 coins
8 at a time, foreclosed a large section of the market,
9 basically put these lots beyond the ability of the
10 small buyer or small collector to even bid upon
11 them.

12 Consequently the values realized were
13 fire-sale values, your Honor; they were not
14 commercially reasonable figures. And for those
15 reasons, for the reasons that thousands of coins were
16 sold at People's Bank. And I attach a very
17 interesting item to one of my memoranda, your Honor,
18 that Fleet Bank had filed when they objected to the
19 People's sale in Bankruptcy Court, Fleet was
20 contending that the value of the coins at People's
21 Bank was in excess of one million dollars, and to
22 wipe out a loan of \$140,000.00 and change would not
23 be commercially reasonable, and that People's was
24 actually an over-secured creditor and the sale should
25 not take place as People's was attempting to have it

1 take place. That sale did take place. Curiously
2 enough, your Honor, the amount that they realized
3 from that sale almost exactly matched the amount of
4 that loan. There was no -- there was essentially no
5 overage coming back to Fleet.

6 And this goes to my second point, that
7 being that I think the point has been clearly
8 established that Eastland Bank had a secured interest
9 in all of the assets of Cumberland. And the
10 government's attempt at this point in time to
11 suddenly say, well, that issue has never been clearly
12 established and we don't know if they have an
13 interest in all these items or not is misleading,
14 your Honor. Fleet Bank which is the successor to
15 Eastland Bank, is still to this day claiming an
16 interest in all of the assets of Cumberland, not only
17 the 7,820 coins that they had immediately under their
18 control, but all the coins in the safety deposit
19 boxes and every other coin Cumberland ever had. And
20 in my memorandum, your Honor, I mentioned the fact
21 that Mr. Posner himself in the sentencing memoranda
22 attached copies of the pledge and security agreements
23 indicating that the bank had a lien against all of
24 the assets of Cumberland.

25 I also recited the numerous UCC filings

1 that were filed here in Rhode Island covering all of
2 the non-possessory assets of Cumberland Investment as
3 well. I think the point I'm getting to, your Honor,
4 is that the point has been made abundantly clear that
5 Eastland is claiming a lien in all of these assets
6 and consequently you should not ignore these other
7 items of the inventory, that you should reduce the
8 loan amount by all of the assets of Cumberland, and
9 you should credit this \$143,000.00 shortfall that the
10 defense contends should exist, you should essentially
11 wipe that out, your Honor, exercising your discretion
12 and mindful of the fact that the guidelines say that
13 the amount of loss does not have to be determined
14 with exact precision, it has to be based only upon
15 the reasonably accurate and available information
16 that you have.

17 Consequently, your Honor, the defense is
18 arguing that there is a shortfall of zero in this
19 case. There is actually no shortfall or economic
20 loss to Eastland Bank. That's not to say that
21 crediting the jury's verdict with respect to the
22 seven counts that my client was convicted on that
23 fraud did not occur. The defense suggests that we
24 start off with a base guideline level of six. That
25 your Honor not enhance that sentence for two points

1 for perjury. I, in my objection to the presentence
2 report --

3 THE COURT: I've already told you I'm not
4 going to do that. So you don't have to argue.

5 MR. LUTES: I would ask, your Honor, not
6 to enhance the sentence for two points for the
7 downfall of a financial institution. I think the
8 record is incomplete if nothing else on this point.
9 There's been absolutely no information presented
10 indicating what significance of this Cumberland loan
11 was to Eastland Bank. Certainly the bank experienced
12 a problem and they've incurred expenses in attempting
13 to collect this loan, but even assuming the
14 defendant's worst case scenario that there is
15 \$133,000.00 shortfall, your Honor, it's hard to
16 believe that a bank with assets of hundreds of
17 million dollars of dollars would be subjected to a
18 failure or a downfall based on a shortfall of
19 \$133,000.00. I think the standard your Honor has to
20 abide by is one of some type of convincing or
21 credible evidence from the government indicating at
22 least a percentage of loss that this loan was
23 responsible for to the institution. And I don't
24 think simply having a conclusory affidavit saying, we
25 lost, we lost the loan, we lost the interest, people

1 lost their jobs is sufficient, particularly in light
2 of the banking climate as a whole in this state and
3 this region, your Honor. And again, the defense
4 would argue that Mr. McQueen's affidavit that the
5 bank incurred interest and attorney's fees, things of
6 that nature, that constitutes consequential damages,
7 again, that your Honor is not permitted to consider
8 in making a determination.

9 One point that the government did not make
10 in its argument, but I think I have to deal with,
11 your Honor, is the two-level enhancement for more
12 than minimum planning.

13 In light of the facts of the case, your
14 Honor, I would ask you not to award a two-level
15 enhancement for more than minimum planning for one
16 simple reason, and that being that the evidence that
17 was adduced from the witness stand was that the fraud
18 consisted of financial statements which were prepared
19 by chartered accountants in Canada being presented to
20 the bank in support of applications for loans, and
21 that those financial statements were based upon one
22 appraisal in 1985 that is alleged to be fraudulent
23 due to the fact that there was a financial
24 relationship between Mr. Chorney and Mr. Tebbetts;
25 and the defense has admitted that there was a

1 financial relationship between Mr. Chorney and Mr.
2 Tebbetts. What the defense's point was, that does
3 not render the appraisal inaccurate in and of
4 itself.

5 The defense presented Mr. Brown, an
6 accountant who testified that in situations where
7 there is an issue of lack of independence of an
8 appraisal, alternative auditing procedures must be
9 employed to determine whether the figures that
10 appraisal represents are accurate or not. Mr. Brown
11 testified that the accountants in Canada did in fact
12 employ those calculations and those additional
13 measures to determine the figure was accurate, and
14 that they subsequently hired another appraiser as
15 well.

16 So in light of that, your Honor, in light
17 of the fact that we're talking about one appraisal
18 and then subsequent financial statements that were
19 issued by accountants, not Mr. Chorney, I would ask
20 not to enhance his sentence for two points for more
21 than minimum planning.

22 With respect to the inadequacy of the
23 criminal history category, your Honor, I contend that
24 that is not warranted by the guidelines by any
25 interpretation of the guidelines. And even if it

1 were, your Honor, I think you should be mindful of
2 the fact that Mr. Chorney has already basically been
3 punished for that by being found in contempt in the
4 Bankruptcy Court and being find \$200,000.00. I think
5 to further punish him by saying we are going to
6 enhance your sentence for this conduct, for the same
7 conduct would subject to him being penalized twice
8 for the same activity.

9 Additionally, your Honor, and I can't
10 argue the entire Bankruptcy Court case here in court,
11 but the primary reason why additional expenses were
12 incurred in the Bankruptcy Court was because Mr.
13 Chorney was essentially pro se throughout those
14 proceedings. He filed numerous pleadings, he
15 interposed objections to many of the things the
16 trustee was attempting to do in that case, but it
17 does not rise to the level of criminal conduct, your
18 Honor. And that's why it should not be calculated or
19 figured into his criminal history category. My
20 client has no prior convictions, your Honor. This is
21 the only time he's ever been convicted of any
22 criminal conduct. As such, I contend that his
23 criminal history category has properly been
24 determined by the Department of Probation as a level
25 one.

1 In light of the fact the defense is
2 contending that there was no actual financial loss to
3 the bank, the defense contends that there is no
4 restitution that should be set. Due to my client's
5 indigency, your Honor, the defense contends that no
6 fine should be assessed against him, as well as the
7 fact that no costs of supervised release or any other
8 items that your Honor may attribute, such as there
9 was a discussion at one point as to whether Mr.
10 Chorney should be held responsible for the attorney's
11 fees that I've presented to the Court as
12 court-appointed counsel. I would ask, your Honor, in
13 light of his indigency, not to assess any costs of
14 supervised release or any other consequential
15 damages.

16 In conclusion, your Honor, the defense
17 contends that Mr. Chorney's sentence should be
18 determined as a guideline level six, or if your Honor
19 chose to enhance it for two levels for more than
20 minimum planning, which I concede is a close
21 question, no more than a guideline level eight. In
22 either event, your Honor, the sentence is the same
23 which is zero to six months in prison as a criminal
24 history category one. And that would also allow your
25 Honor to issue a sentence of probation because as

1 your Honor is aware, this is a split-sentencing
2 issue; some of the counts are pre-guidelines.

3 I would point out to your Honor that even
4 assuming the worst case scenario, that your Honor did
5 not credit any additional sums for the People's Bank,
6 Christie's and Bowers and Merena auctions, the amount
7 of financial loss the defense contends under a worst
8 case scenario is \$133,739.50. That would essentially
9 result, your Honor, in a total offense level of, I
10 believe, it's a 13, your Honor, which should be 12 to
11 18 months incarceration.

12 And finally, your Honor, just in
13 conclusion, if I may, I would just like to offer my
14 comments in perspective as an attorney who's gotten
15 to know this individual for the past 18 months or
16 so. You'll recall this case was originally begun in
17 September of 1992. Now, as we stand here in March of
18 1994, I have had quite a bit of contact with Mr.
19 Chorney. I've been able to make some or arrive at
20 some conclusions as to who he is and what type of
21 person he is based upon my 18 months or more in
22 association with him.

23 And I would just like your Honor to know
24 that in my opinion, not as a lawyer, but as a person,
25 Mr. Chorney is an individual of very strong ideas. I

1 do not believe that he ever had any intent to defraud
2 a financial institution or to defraud any investors.
3 I think that he had a lot of confidence in the assets
4 that he was selling. I know that he personally put
5 his family, his brothers, his relatives into these
6 assets because he thought they were a good
7 investment. He perhaps took some -- some moves that
8 in hindsight were not the best moves to make, such as
9 going to Boston and incurring huge overhead,
10 attempting to establish a nationwide marketing of
11 these items. They are not items, in hindsight, your
12 Honor, that are susceptible to this kind of
13 marketing. And Mr. Chorney realizes that, but
14 unfortunately it's already been done, the detriment
15 has already occurred not only to the bank, but Mr.
16 Chorney's reputation and standing in the community.

17 He has suffered as well as the bank. He
18 has lost his entire life savings. He put all of his
19 money into these assets because he believed in these
20 assets. He is indigent, your Honor. I don't have
21 any doubts as to that. There have been occasions
22 we've gone out for coffee and I've sprung for the
23 coffee because he didn't have the pocket change to
24 buy the coffee, frankly.

25 THE COURT: You are one of the last of the

1 big spenders. Go ahead.

2 MR. LUTES: I would just ask, your Honor,
3 considering all of this information to please very
4 seriously consider the defense's evaluation of the
5 guidelines and of the conduct that occurred here.
6 And just one final thing. It's my belief that much
7 of what occurred in this particular case is due to
8 the fact that the bank, and perhaps Mr. Chorney
9 himself did not have a true understanding of the
10 nature of these assets.

11 Your Honor heard testimony from alleged
12 experts that some of these coins can go from a value
13 of ten or fifty dollars, to five or ten thousand
14 dollars and any layman looking at these coins would
15 be hard pressed to tell any difference between these
16 two items. But the reality is that there are people
17 out there who collect these things who are willing to
18 pay these outrageous amounts of money for these
19 items, and the difference may only be a scratch, a
20 location of the scratch, the depth of the scratch;
21 it's very subjective, your Honor. And considering
22 all this, your Honor, I would very strongly request
23 that you consider imposing a probationary period with
24 a three-year term of supervised release. Thank you.

25 MR. POSNER: Your Honor --

1 THE COURT: Please, I've heard arguments.
2 Mr. Chorney, will you go to the microphone?

3 MR. CHORNEY: Good morning, your Honor.

4 THE COURT: I'm about to sentence you, Mr.
5 Chorney. And before I do, I want to give you every
6 opportunity to make any statement that you wish.
7 First I want to ask you, are you satisfied with the
8 representation that you have received from your
9 defense counsel in this case, Mr. Lutes?

10 MR. CHORNEY: I was going to qualify that
11 in my statement, but in general I'm very satisfied,
12 yes.

13 THE COURT: In general?

14 MR. CHORNEY: Yes, I have some specific
15 comments that I wanted to make in relationship to the
16 representation, yes.

17 THE COURT: All right. Well, all right.
18 Your lawyer has spoken on your behalf and now I will
19 give you an opportunity to make any statement that
20 you wish on your own behalf. Do you wish to do
21 that?

22 MR. CHORNEY: Yes, I do, your Honor.

23 THE COURT: All right. Go ahead.

24 MR. CHORNEY: Your Honor, I want to tell
25 you a little bit about who I am and then read to you

1 a prepared statement explaining some of the
2 inconsistencies and other issues involved before the
3 Court, before I introduce at the conclusion of my
4 talk a second Anders motion.

5 If you recall, in my first Anders motion
6 you had commented about it being a 200-case
7 situation, you had never heard of one of those
8 before. And I had stated case law on First, Fourth,
9 Fifth, Sixth, and Ninth Amendment violations which
10 occurred during the process of this case. That was
11 at the very beginning in March, your Honor.

12 But first I want you to know that had you
13 granted the motion for me to be co-counsel, which was
14 presented to you in March also, the presentation of
15 this case may have been somewhat different. And as
16 my presentation to you continues this morning, those
17 areas which would have been different I think will
18 become very apparent to you. In addition, I would
19 have objected to those areas that Mr. Posner has
20 mischaracterized.

21 THE COURT: Just a moment, Mr. Chorney.
22 Let me understand something here. Did anything ever
23 transpire at any point of this trial where you had
24 disagreement with your attorney as to the procedures
25 that were being taken?

1 THE COURT: Yes, there were sometimes when
2 I wanted Mr. Lutes to go into the issue about coins
3 being switched that were in the possession of
4 Eastland Bank. And basically Mr. Lutes indicated to
5 me that he thought that the issues before the jury
6 were so complex that they were already very confused
7 concerning reverse takeovers and other complex
8 issues, and that to introduce that the coins that
9 were being graded by the government experts were not
10 even the same coins that were originally put on as
11 collateral with Eastland Bank, he thought to
12 introduce that at trial would be an error, even
13 though Mr. Posner, during trial made allusion to that
14 fact a few times, your Honor.

15 THE COURT: Do you agree with that, Mr.
16 Lutes?

17 MR. LUTES: Yes, that's correct, your
18 Honor. Mr. Chorney did want me to get into the issue
19 of switch coins, and I made a judgment at that point
20 and found that that was not the strategy that I
21 desired to pursue. That's correct.

22 THE COURT: Okay. What other experience
23 did you have in the course of trial that you felt you
24 were at odds with Mr. Lutes?

25 MR. CHORNEY: Well, basically, your Honor,

1 Mr. Lutes was a very great disadvantage concerning
2 many of the issues brought up in relationship to the
3 bankruptcy proceeding where Mr. Posner actually
4 testified in the civil proceedings, had over 30
5 meetings with Mr. Bertozzi in relationship to them,
6 actually was made a party by Judge Votolato to
7 drawing up one of the court orders.

8 And all of this information that Mr.
9 Posner has been bouncing back and forth with the
10 people in the bankruptcy proceeding for years, and
11 had intimate knowledge of, Mr. Lutes steps into a
12 picture and all of this information is brought into
13 it. And what I'm indicating is, had I been
14 co-counsel in relationship to it I would have
15 objected to many of the mischaracterizations which --
16 as they were presented.

17 THE COURT: Just a minute. Will counsel
18 look through the papers and find where this motion
19 for co-counsel was filed, whether there was any
20 ruling on this motion to be co-counsel? Just look at
21 them right up here. And you can be seated, Mr.
22 Chorney, and we'll pick this up after the Court's
23 rulings on this so-called motion can be located and
24 found.

25 (R E C E S S)

1 THE COURT: Thank you. Please be seated.
2 All right, Mr. Chorney. Carry on.

3 MR. CHORNEY: To give you another example
4 of why I wanted to be co-counsel, your Honor, due to
5 the voluminous nature of this case, just to site some
6 things which happened as recently as the 21st of
7 January hearing of 1994.

8 On page 15 of that hearing Mr. Posner
9 talks of eleven thousand coins that had to be
10 evaluated by the government appraiser, and we had to
11 get an appraiser also. On page 47, he states that we
12 started with twenty-five, seven thousand eight
13 hundred as collateral, six thousand were sold off
14 leaving eleven thousand. Well, your Honor well knows
15 that from the figures from the appraisers that there
16 was roughly eight thousand five hundred coins and
17 this was an inaccurate figure.

18 Later on he blames Mr. Lutes for coming up
19 with this eleven thousand figure which he came up
20 with in the first place. But what I'm trying to
21 bring out here is that there's some
22 mischaracterizations about myself choosing the four
23 thousand coins which were graded at Eastland Bank,
24 when in effect they were taken in the same order that
25 Sotheby's looked at them; we just ran out of the

1 plastic flips to put the coins from rolls into
2 individual holders at the direction of the
3 court-appointed examiner.

4 On page 26 it says defendant's grading and
5 the government's witnesses' grading are roughly the
6 same, and that's not true. There was a qualification
7 that I did not agree that these were the same coins
8 that we were grading when we were grading them in
9 March of 1990, that they were not the same coins that
10 were placed in Eastland Bank as collateral at the
11 very beginning.

12 Also on page 30 when the Court asked Mr.
13 Lutes, and you had full and complete opportunity to
14 conduct your cross-examination, and he stated,
15 correct. I believe that's not correct, your Honor.
16 During the trial Mitch Tworkowski from Sotheby's was
17 never served. As you are aware of, Mr. David Tripp
18 from Sotheby's came here for the trial and he was
19 cross-examined. And we had subpoenaed Mr. Tworkowski
20 to come, we had talked with him prior to him taking
21 off for someplace -- I don't know -- and he was never
22 served. And basically all the grading that was done
23 by Sotheby's, the values and pricing all was derived
24 from the work of Mr. Tworkowski.

25 In addition, FDIC was also subpoenaed at

1 trial to show up with various coins, which we wanted
2 different people to look at including Mr. August, Mr.
3 Moffatt, Mr. Leidman and also Mr. Tworowski. FDIC
4 never showed up with these coins. And the only
5 response that we got from them later on, your Honor,
6 was a general inventory indicating one thousand one
7 hundred coins were missing from the Eastland Bank
8 collateral.

9 I'd like to talk a little bit about the
10 severance portion of the trial, if I might, your
11 Honor. In my opinion, had the severance of counts
12 been granted, that motion been granted, once again
13 the presentation of the trial would have certainly
14 been a lot different. At the severance hearing dated
15 March 11th, 1993, on page 33, Mr. Posner quotes, this
16 case is not about value. This case is about grading
17 or quality or condition of U.S. silver dollars. Both
18 in the bank fraud aspect and in the mail fraud
19 aspect, what it's going to come down is that
20 representations made by the defendant that all these
21 coins as inventory, the coins he pledged to the bank,
22 the coins he sold to investors were sold as MS 65.

23 On page 34 once again Mr. Posner
24 indicates, we are not interested in value. He also
25 indicated that the bank loan based on the grade of MS

1 65 silver dollars and not the value of the coins,
2 which I find rather incredible since they required
3 appraisals semiannually and they also required copies
4 of our certified audited financials, which is another
5 area which I believe was not covered with any great
6 amount of detail, especially the aspect concerning
7 grading standards that be used.

8 Basically in the certified financials, all
9 of these standards that were applied by the
10 appraisers who were appraising the coins for
11 Cumberland Investment Corporation were stated very
12 much up front, where the government's appraisers,
13 what standards they were using or implying or have
14 used throughout all the appraisals and valuations
15 conducted throughout the trial, and also in valuing
16 the inventory at the end, your Honor, has been quite
17 vague.

18 Basically based upon the representation
19 that the mail fraud and the bank fraud had the same
20 representations, the motion for severance was denied
21 by your Honor. And I just wanted to mention that had
22 I been co-counsel in this case, perhaps I would have
23 provided a different approach to the severance
24 portion that was offered to you in the motion form,
25 your Honor.

1 I'd like to just start off telling you a
2 little bit about myself and what work I was involved
3 in, a little bit about Cumberland and some
4 educational emphasis, some endorsements and awards,
5 professional organizations that I belong to, what my
6 qualifications are, where I'm published and what mass
7 media I have appeared on. Your Honor, my folks both
8 came from the old country, they went through Ellis
9 Island; they came in from Ukraine. My mother came
10 from the Ukraine, my father from Batsaravia
11 (phonetic) which is now part of Romania. And
12 basically they came over to this country when they
13 were children, but their parents wanted them here
14 because where they were living they didn't have
15 anything called due process. People lost their
16 property and their liberty with virtually no
17 recourse.

18 They were very hard working, loving people
19 and they raised four sons of which I'm the third.
20 I'm 55 years old. My brother, my youngest brother
21 lives in Warwick and he's 53, he teaches in North
22 Providence. My next oldest brother is Milton who
23 lives in Las Vegas. He is an upholsterer. My oldest
24 brother is a doctor of engineering. His name is Paul
25 and he lives in Sudbury, Massachusetts.

1 I have two children, one of which you had
2 the opportunity to hear during trial. I have a
3 daughter Sara who lives in Los Angeles and she has
4 two children who are my grandchildren. And I'm very
5 proud of my children, both Louis and Sara.

6 As far as my educational background is
7 concerned, I have a BA in Russian studies from Brown
8 University. I've taken courses at Providence
9 College, Bryant College and the University of
10 Delaware. I didn't come from a well-to-do family,
11 your Honor.

12 I had to work when I went through college,
13 I put in 30, 40-hour weeks while going through
14 Brown. While at Brown I was in ROTC and when I
15 graduated from Brown, I entered the military. I was
16 a captain in the Air Force. I flew for a outfit
17 called MAC, M-A-C, which used to be MATS, used to be
18 Military Air Transport Service which became the
19 Military Air Command. During the military I flew in
20 and out of the Viet Nam 37 times.

21 I'm currently living with another Viet Nam
22 veteran by the name of Roland Martin and he is on 100
23 percent disability, and he suffers from
24 post-traumatic stress syndrome. Roland is in back
25 over there, and I told Roland I would say Viet Nam

1 vets never quit so I will make that statement.

2 When I left the military, your Honor, I
3 entered teaching, the teaching profession. I taught
4 math at Woonsocket Junior High School from 1967 to
5 1976. During this time I opened up a part-time coin
6 store called Cumberland Coin in 1968. I was a d/b/a,
7 doing business as.

8 I guess I'm a workaholic. I think I put
9 in my fair share of hours. Incorporated the business
10 in 1981. Had dreams of doing things that nobody else
11 has ever done with tangible assets before and to
12 further this dream I moved to Boston in 1984 to
13 1985. When eventually, Cumberland was involved with
14 the reverse takeover of a public company called
15 Wescap Enterprises Limited. And it was through this
16 vehicle called my Frankenstein, if you must, that I
17 had dreams of doing various things including placing
18 hard assets into retirement programs in the United
19 States.

20 You know, sometimes you have a
21 Frankenstein that you invent or create and after
22 awhile you don't know whether or not you rule the
23 monster or the monster rules you. After awhile I
24 didn't know whether or not I was working for
25 Cumberland or Cumberland was serving me. I've always

1 placed a great deal of emphasis upon education. The
2 Money School of Boston was wholly sponsored by
3 Cumberland Investment Corporation.

4 I believe during trial you had an
5 opportunity to see some of the people that were
6 sponsored on this program. I was also on the Board
7 of Governors of the National Center for Financial
8 Education and had the distinct honor of presenting to
9 the New York State Board of Accountancy continuous
10 education credits for accountants in relationship to
11 putting hard assets into retirement programs. Things
12 such as self-directed or non-self-directed Keough
13 programs.

14 Speaking of Keough, the Honorable Eugene
15 Keough, who's the father of retirement planning in
16 the United States, was one of the endorsers of
17 Cumberland. He also introduced me to Claude Pepper
18 and other people who were interested in having the
19 American people have the ability to choose what they
20 wanted to put in their own retirement program. Other
21 endorsements, Warren Dunton who was the father of
22 financial planning in the United States; Howard
23 Segemov (phonetic), president of the Industry Council
24 for Tangible Assets; H.I. Sonny Block (phonetic),
25 founder of the Action Line Group.

1 Concerning awards, Mike A. Fowler, Jr.,
2 U.S. Senator from Georgia, had the Fowler award, and
3 I don't have the Senate number on it with me, but
4 basically the award was for national efforts to bring
5 about improved laws to better protect the best
6 interests of the American consumer investor. I
7 received awards from the following places: New
8 Orleans, Miami, Indianapolis, Atlanta, Tucson,
9 Nashville, Baltimore, Portland, Oregon, St.
10 Petersburg, Oklahoma City, St. Louis, Salt Lake City,
11 Denver and from the Governor of Kentucky, Martha Lane
12 Collins.

13 I belong to the following professional
14 organizations: The American Numismatic Association,
15 NENA which is the New England Numismatic Association,
16 FUN which is Florida United Numismatist, New England
17 Appraisers Association, The Industry Council for
18 Tangible Assets, the Coin Club of Rhode Island, the
19 American Philatelic Society, and a whole bunch
20 others; I just don't even remember what they are.

21 I have published articles in Barron's
22 Financial. In fact Barron's Financial never had a
23 coin section until I started advertising with them on
24 a weekly basis, and was shortly after that that they
25 decided that it would be prudent to show the American

1 public that there were alternatives to paper assets
2 and consequently put in a section shortly following
3 that on hard assets. I also had a monthly column in
4 the New England Appraisers Association monthly
5 magazine. I'm published in American Banker and
6 Tradesmen, Duck Book, Walth Magazine (phonetic) and
7 Life Insurance Selling Magazine to name a few.

8 I've been on numerous radio and television
9 shows nationally. Had my own radio show in Natick,
10 Massachusetts on WKTP, and my guests included such
11 people as Richard Pand (phonetic) who was the editor
12 of Personal Finance, John DeSauer (phonetic) who's
13 involved with international diversification, Fred
14 Newcomb who was the president of the No Load Mutual
15 Fund Society, Lauren Dunton and a variety of other
16 people.

17 I believe I was on the show for a year and
18 three months. I've done other TV appearances on
19 Financial News Network, WABC, and in San Antonio WOAI
20 on radio shows, Kansas City and a whole bunch of
21 other national talk shows as an expert on tangible
22 assets.

23 Other than an existing heart condition,
24 I'm in very lively, relatively good health, although,
25 I have a hearing impediment from being in the flying

1 business.

2 I feel I fought against kind of
3 overwhelming orders in this case. I have a
4 court-appointed attorney for some 18 months now. And
5 I don't believe he's been paid at all, nor have any
6 of our experts been paid.

7 In fact, one of the reasons I believe we
8 had difficulty in pricing up some of the assets just
9 recently and didn't come in with some quotes may be
10 because of the voluminous nature of pricing of these
11 assets, where someone would have to take weeks or if
12 not a month in order to do it correctly. And
13 consequently would have just passed on it instead.
14 And some of these people have written to Mr. Lutes
15 concerning not being paid for their first amount of
16 testimony, Mr. Moffatt being one.

17 In contrast, the U.S. Attorney has had the
18 benefit of limitless resources of taxpayers money
19 through the Postal Inspector, the FBI, the Justice
20 Department, and the U.S. Trustee who's apparently
21 borrowed money from the Cumberland estate to
22 investigate me rather than to administer the estate.
23 However, on my side, I feel I had the truth and the
24 benefit of an energetic attorney who's wise beyond
25 his years, who I really cannot say enough about.

1 At this time I would like to read a
2 prepared statement for the Court and then to go onto
3 some particulars concerning some of the complex
4 issues in the case.

5 Your Honor, I am guilty of no wrong doing,
6 there was no attempt or intent to defraud anyone.
7 The evidence clearly showed that I, in good faith met
8 my fiduciary responsibilities to the bank, my
9 clients, and to my shareholders by number one, giving
10 to Eastland Bank a list of places to get qualified
11 appraisers which included the American Numismatic
12 Association and the New England Appraisers
13 Association.

14 Secondly, I gave to Eastland Bank at their
15 request a list of qualified appraisers in the local
16 area which included Mr. Tebbetts.

17 Thirdly, the record will show that the
18 bank chose Mr. Tebbetts and that when Mr. Tebbetts'
19 character fell into question, it was Ernst & Whinney
20 that insisted upon a new appraiser; and after
21 exhaustive techniques verified the Tebbetts'
22 appraisal as being true and accurate.

23 Fourthly, full disclosure of the
24 relationship between Mr. Tebbetts and Cumberland was
25 given to the auditors. In fact, no evidence was

1 adduced at trial which included any statements by me
2 that my relationship -- that no relationship existed
3 between Mr. Tebbetts and myself. Had I testified at
4 trial, I would have explained the relationship.
5 However, I was under advice from counsel not to
6 testify since in his opinion the government had not
7 proven their case beyond a reasonable doubt.

8 Fifthly, the evidence will show that
9 according to Mr. Lockey's testimony, it was Ernst &
10 Whinney, the accountants, that insisted upon keeping
11 Richard August as the appraiser even though Mr.
12 Lockey thought it would be prudent to get another
13 opinion. And Mr. Lockey testified that I agreed to
14 having that third appraiser.

15 To find me guilty of knowingly and
16 willfully making false statements and reports to
17 federally insured institution is just not supported
18 by the evidence adduced at trial.

19 I must question the jury's decision to
20 place more emphasis upon an admitted non-reliance
21 document, the Sotheby's appraisal, than upon the
22 unqualified, certified appraisal of a Big Eight
23 firm. This decision defies the imagination
24 considering the standards of reasonable doubt.

25 What is understandable is that there are

1 many inconsistencies. However, these disparaging
2 inconsistencies can be explained. The government at
3 trial had brought up the fact that Chorney had
4 claimed that the coins in the possession of Eastland
5 Bank were not the same coins that were originally
6 given to them as collateral.

7 When I had asked my attorney, Mr. Lutes to
8 pursue this avenue prior to the government bringing
9 it up, Mr. Lutes advised me that in his judgment,
10 that this should not be pursued since the jury was
11 already confused over the complex nature of reverse
12 take-overs, certified appraisals, and non-reliance
13 documents. Mr. Lutes told me that he would at my
14 request give me an affidavit to that effect.

15 Adequate proof concerning the coins being switched
16 and the inventory dissipating corroborated by third
17 parties was presented to counsel prior to trial.

18 To state that I knowingly and willfully
19 produced statements that were false was not proven
20 beyond a reasonable doubt. To base a conviction upon
21 the Tebbetts' appraisal which was an interim
22 financial statement inclusion for the purpose of the
23 acquisition of Cumberland by Wescap would mean that
24 the jury equated lack of independence with being a
25 false report. If this is true, and I claim that the

1 law itself is constitutionally vague, in that it
2 fails to give adequate notice to people of ordinary
3 intelligence of what conduct is prohibited or it
4 invites arbitrary and discriminatory enforcement.

5 In light of the fact that in good faith I
6 had taken every step required by the bank, and by
7 jumping through every hoop presented by Ernst &
8 Whinney, it defies my imagination to see how I could
9 knowingly and willfully had done anything wrong when
10 it was the accountants and the appraisers who
11 produced the statements that Eastland Bank relied
12 upon. I feel that I am the victim of circumstances
13 which include the subjectivity of grading, price
14 fluctuations in the marketplace and the irresponsible
15 actions of Eastland Bank. Certainly I would not
16 knowingly harm my family and friends by putting them
17 into an investment that was non-solvent.

18 The jury acquitted me of mail fraud. How
19 they decided that I knowingly and willfully defrauded
20 Eastland Bank, but did not defraud my coin investors
21 is difficult for a reasonable man to understand.
22 I've lost my personal teaching retirement fund which
23 was part of the assets removed during the bankruptcy
24 initiated by Eastland Bank. My friends and relatives
25 who invested in Wescap at my suggestion have

1 suffered. My family and friends and I have suffered
2 more than financial loss, and have been said to be
3 associated with schemes to defraud when in actuality
4 no such schemes existed.

5 One can always make money, your Honor, if
6 you are willing to work. However, once you lose your
7 reputation and your good name that's another story,
8 that follows you to the grave. Under the
9 circumstances there can be no justice in convicting a
10 man of presenting information which he believes to be
11 true. In fact, I'm outraged at the offer to reduce
12 my sentence by a few points by accepting
13 responsibility for my actions and consequently
14 placing my appeal in the john and -- when I have done
15 nothing wrong except perhaps dealing with the wrong
16 bank like thousands of other people in the State of
17 Rhode Island who have suffered from the wrongful
18 actions of banks which has recently come to light.
19 That's the end of my prepared statement, your Honor.

20 I'd like to give you a little background
21 concerning my relationship or Cumberland's
22 relationship with Eastland Bank. Really went back to
23 when I was still teaching in the community and had
24 the store on a part-time basis and started off with
25 perhaps \$5,000.00 and maybe crept up to a

1 \$50,000.00 situation.

2 Really, the loan history between
3 Cumberland and the bank I don't feel is very normal
4 at all. They listened to me when I told them that it
5 was not a normal business like selling shoes and
6 things like that, and there were times in the year
7 when all we did was buy and there were other times
8 when all we did was sell. So it wouldn't be unusual
9 for Cumberland to be six months or up to six months
10 behind in interest at any one point in time. But
11 basically the bank in the past had never been worried
12 because they were sitting on physical collateral that
13 covered the loan and then some.

14 The bank was quite aware of the nature of
15 the collateral and that it could not be quickly
16 sold. I had given to a Mr. Lang and other officers
17 of the bank videotapes concerning tangible assets.
18 And in my impression they were aware of the nature of
19 the assets. Mr. Hollis told me that he was under
20 enormous pressure to get interest up to date and the
21 note paid down.

22 This was, I believe, in the 1988 era when
23 he had talked with Mr. Mollicone about getting Mr.
24 Mollicone's appraiser in by the name of Ken Goldman.
25 And I do believe if one were to check the testimony

1 of Mr. Hollis before the grand jury, and also before
2 -- while at trial, and compare it with some other
3 depositions that I had concerning Mr. Hollis, that
4 there may be some slight differences in his
5 testimony.

6 Because of the need to get money to pay
7 down the loan, I asked Mr. Manter from Florida to
8 assist me in selling some of these coins. Just
9 recently Mr. Lutes gave me an affidavit concerning
10 Mr. Manter and how he sold a singular bag from the
11 People's Bank collateral for some \$235,000.00 and
12 there were another six and a half bags of similar
13 quality sitting in People's Bank, yet on those 6,500
14 coins they only netted some \$140,000.00 when -- which
15 is incredible considering the fact that Eastland Bank
16 themselves objected to the People's Bank sale because
17 they had an appraisal stating that the six and a half
18 bags were worth in excess of one million dollars,
19 your Honor.

20 We also gave extra collateral to Eastland
21 Bank at that point in time. And in good faith
22 stored, and box 945, another large chunk of value of
23 silver dollars. And I do believe that there may be
24 some legal precedents concerning legal right of
25 offset if Eastland Bank had a shortfall in the loan.

1 But when this last loan occurred on May
2 30th of 1989, it was understood by both Eastland Bank
3 and myself that, number one, collateral existed to
4 cover the note that was independently evaluated and
5 certainly they could have had whoever they wanted
6 evaluate it.

7 Secondly, which has not come to light in
8 any way, in case of a default, that the collateral --
9 well, in case of default that the collateral would be
10 sold in a commercially reasonable manner. And number
11 three, which has not come to light yet, your Honor,
12 is that the bank would sell the collateral in its own
13 possession first before moving against any other of
14 the collateral.

15 In December of 1987, there was an
16 agreement in writing between senior vice president
17 Tom Hollis and myself which basically stated in case
18 there were a default on the loan, that they would
19 sell the coins under their own possession first
20 before they moved against anything else.

21 Well, some crazy things started to
22 happen. The bank in the third quarter lost 15
23 million dollars. Mr. Hollis and other people
24 resigned. Discrepancies with the inventory which was
25 taken over a three or four-month period started to

1 occur and Mr. Lockey informed me about these
2 discrepancies and I have an affidavit to that effect
3 with me.

4 We requested that Eastland take a full
5 inventory of the coins that they had. I had a
6 meeting with Mr. DeFusco who was legal counsel for
7 Eastland, and I asked him at that point in time if he
8 would send the coins to the two most prevalent
9 grading services, PCGS and NGC. I wrote him a letter
10 to that effect on the 7th of September of 1989.
11 There was time stamped in at Eastland Bank. I did
12 not even receive any response to it in writing.

13 Eastland insisted that Sotheby's come in
14 to evaluate the collateral. We agreed that it would
15 be okay on the condition that we got three separate
16 appraisals and there is a letter to a Michael
17 Silverstein from Hinckley, Allen who represented
18 Eastland Bank concerning these precondition. On the
19 2nd or 3rd of October of 1989 Sotheby's came in and
20 did an appraisal. And perhaps the grading is
21 credible if it were qualified a little bit. And what
22 I'd like to do is qualify it a little bit for you
23 right here and now, your Honor.

24 THE COURT: How long are you going to be,
25 Mr. Chorney?

1 MR. CHORNEY: I have a little while to go,
2 your Honor.

3 THE COURT: How long?

4 MR. CHORNEY: I have quite a bit to go,
5 your Honor.

6 THE COURT: Well, how much time are you
7 going to take so I can make some plans here?

8 MR. CHORNEY: Your Honor, I feel I need a
9 good couple of hours.

10 THE COURT: A couple of hours?

11 MR. CHORNEY: A good couple of hours,
12 yes.

13 THE COURT: We'll take a recess and come
14 back at 1:30.

15 (R E C E S S)

16 (Resumed at 1:40 p.m.)

17 THE COURT: Thank you. Please be seated
18 all right. Carry on, Mr. Chorney.

19 MR. CHORNEY: Your Honor, I'm reading
20 from the September 28th, 1989, agreement between
21 Eastland Bank and Cumberland Investment Corporation,
22 and the other signature involved on it is Sotheby's.
23 And in the Section 1V it says, is not furnished and
24 will not be used or relied upon in connection with
25 any transaction involving the property. Including,

1 but not limited to, any loan donation or exchange.
2 This document that I'm reading from, your Honor, is
3 in reference to the 7826 coins that Sotheby's
4 evaluated that were -- was considered Eastland's
5 collateral at Cummings Way, Woonsocket, Rhode
6 Island.

7 Is it okay if I hold this up here, your
8 Honor?

9 THE COURT: Yes.

10 MR. CHORNEY: During the trial this was --

11 MR. POSNER: Your Honor, may I go up to
12 see this too?

13 THE COURT: Why don't you bring it back
14 there so they can see it.

15 MR. CHORNEY: Sure. It's the Sotheby's
16 grading chart that they had if you recall. Basically
17 they call a "three plus" a 63, a "two minus" a 64, a
18 "two" is a 64, and "two plus" as a 65. I've been in
19 the coin business for over 30 years, your Honor, I've
20 never seen anybody in the whole world use any grades
21 like this. In the same way I've never seen anybody
22 weigh paper money on a scale to price it up. To be
23 very frank with you, your Honor, I've never seen more
24 than one category of MS 64 listed anywhere. In my
25 estimation, they have a 64 written offer a 65 on this

1 two category. And I'd like to show it to your Honor.

2 THE COURT: I can see it.

3 MR. CHORNEY: Good enough. Basically if
4 this two were a 65, and this "two plus" were a 66 and
5 there were 57 coins that fell in that 66 category,
6 and if you remember the evidence adduced at trial,
7 your Honor, had a whole bunch of coins independently
8 grade by PCGS that came out as MS 66, if those 57
9 coins were MS 66 and the 2s were MS 65s, the value in
10 the collateral at Eastland Bank in May of 1989, using
11 Sotheby's grading would have been two and a half
12 million dollars exactly.

13 I want to show you how they determined the
14 value to place on the coins in the first place. And
15 this is what we were going to go over with Mitch
16 Tworkowski that we couldn't subpoena or actually
17 couldn't get him subpoenaed.

18 Basically what Sotheby's did, and I don't
19 believe that this was introduced at trial at all,
20 your Honor, although we had an exhibit all made up
21 ready to go in relationship to talking to Mr.
22 Tworkowski. But what they did is, they put down the
23 price of 47 different issues, an MS 63 and an MS 64
24 grades. Then they totaled up what it would be for
25 the 47 and then divided by the 47 and said that the

1 average 63 price would have been \$95.00, and the
2 average 64 price would have been \$385.00 per coin.

3 What they then proceeded to do was to cut
4 the MS 63 price in half and said that it was worth
5 roughly 380,000. Well, that might sound immaterial
6 somewhat to you at this point, your Honor, but what
7 I'm trying to bring out is, Mr. Moffatt and the
8 government experts have testified that the coins in
9 box 945 are of the same quality in general as the
10 coins in the Eastland Bank collateral, both of which
11 are stored at Eastland Bank. And the value of those
12 coins, first of all, the grading of those coins came
13 out to be roughly 63.8 which is close to the 64
14 category, meaning that the average price per coin
15 would be a lot closer to this 385.00 than it would be
16 to the \$95.00 per coin. And would kind of fit in
17 line with the two and a half million dollars being
18 the value of the coins that were sitting at Eastland
19 Bank.

20 Based upon the Sotheby's appraisal which
21 was a non-reliance document, Cumberland Investment
22 Corporation was placed into a State receivership on
23 October 23rd, 1989. During this receivership a
24 variety of things occurred which included harassing
25 employees of Cumberland, people are riding by in

1 vehicles taking their pictures, riding motorcycles.

2 I was told that the bank personnel were
3 ready to come in and take an inventory when a Mr.
4 Felzone from American Auctioneers said that that was
5 not their function, that it was American Appraisers
6 function at that time.

7 We were going to file a Chapter 11 in New
8 York through our New York attorneys, we had a New
9 York office, your Honor. The name of the attorney
10 was Marti Aukerman. And while he was in the process
11 of putting the paperwork together on that, Eastland
12 Bank filed us into an involuntary Chapter 7 in the
13 State of Rhode Island on November 8th, which was
14 converted to a Chapter 11 on December 5th, 1989.

15 It is my contention that Cumberland did
16 not belong in a bankruptcy at all. Funds were not
17 released by the temporary receiver, Allan Shine. So
18 I went out and I borrowed \$25,000.00 from friends and
19 relatives in order to hire attorney John Boyajian to
20 represent me in the Bankruptcy Court of the State of
21 Rhode Island. Little did I know of what I was
22 getting involved with in this Bankruptcy Court,
23 involved numerous conflicts of interest involving
24 Eastland Bank.

25 I'm going to go through a few of these

1 conflicts of interest with you, your Honor. Some of
2 the parties who have ended up testifying against me
3 had a direct financial or other arrangement with
4 Eastland Bank. The list includes, but is not limited
5 to the following, Eastland Bank has fronted
6 \$10,000.00 to Michael Weingarten, the Court-appointed
7 examiner, had fronted \$75,000.00 to the trustee, John
8 Cullen. Eastland Bank was or is represented by
9 Edward Bertozzi, attorney for examiner and the
10 trustee. The disclosure about Edward Bertozzi
11 representing Eastland Bank in the past came out in
12 the bankruptcy hearing only after I had brought it to
13 the attention of the Court in relationship to Mr.
14 Weingarten's representation by Mr. Bertozzi and in
15 Mr. Cullen's attorney contract with Mr. Bertozzi was
16 mentioned.

17 Eastland Bank has hired a private
18 investigatory firm by the name of LCF, the company
19 that Lee Blais was principal at, who testified at
20 this trial. Not only was Lee Blais working for the
21 trustee, he was also working for Eastland Bank on
22 separate occasions with the definite conflict of
23 interest. There is numerous communications with the
24 Postal Inspector going back to the 8th of December of
25 1989 and with Posner -- with Mr. Posner as early as

1 January of '91, according to the billing records
2 which I have received.

3 Once placed into this Chapter 11,
4 Cumberland was placed under a TRO, temporary
5 restraining order which made it virtually impossible
6 to operate. In other words, somebody would come to
7 buy something from you, they would pay you for it,
8 yet we could not deliver the item without permission
9 of the Court.

10 There is an instance during the bankruptcy
11 where we are accused of violating this TRO. In
12 actuality we never violated any TRO. And I have
13 tapes of conversations between myself and Attorney
14 Boyajian which verify the statements that I'm
15 currently making to you.

16 In the 21st of March, 1990, Mr. Boyajian
17 was notified of problems with the coins after the
18 Sotheby's appraisal. What I am indicating to you,
19 your Honor, is after Sotheby's appraised the coins on
20 October 2nd and 3rd of 1989, from that time to March
21 of 1990 there were also other changes occurring with
22 the Cumberland inventory stored at Eastland Bank.

23 Mr. Boyajian sends a letter to the
24 examiner, Michael Weingarten on the 23rd of March,
25 1990, which says the following: As you know, I have

1 previously discussed with you the fact that it
2 appears that individuals employed by the bank had
3 access to the safety deposit boxes, and according to
4 the bank's own records, have opened the boxes on
5 numerous occasions. Additionally, although I believe
6 it was the bank's policy that no one employee should
7 enter the box without another employee present, this
8 policy was not followed. Additionally, Hal and I
9 both question why bank employees would have any
10 reason to gain access to the boxes.

11 In examiner's report number two to the
12 Bankruptcy Court dated the 16th of April, 1990,
13 Michael Weingarten states, note, after only
14 discovering 575 acceptable coins, Hal Chorney
15 asserted that he perceived indication of tampering
16 with the bank vault and he asserted that coins may
17 have been switched by Eastland Bank officers. A
18 review of the vault access records by Mr. Boyajian,
19 however, did not indicate any circumstances in which
20 a single bank officer assessed the safety deposit box
21 alone. In addition, the fact that our sampling of
22 coins from the Cumberland vault collection outside of
23 Eastland's control yielded an equally bad mix, leads
24 us to be skeptical about this claim. That's on page
25 five, examiner's report number two.

1 Well, your Honor, if I read this
2 correctly, they say completely the opposite thing.
3 In a bankruptcy hearing on the motion to strike the
4 examiner's report number two as a sham and deception
5 upon the Court on May 23rd, 1990, John Ponds, an
6 employee of Eastland Bank witnessed on October 17th,
7 1989, stamps missing from the Eastland Bank
8 collateral. I believe that's on pages 15 and 16 of
9 the transcript of that Bankruptcy Court hearing held
10 on May 23rd, 1990.

11 Mr. Boyajian on a cross-examination of Mr.
12 Kirby, branch manager of Eastland Bank, concerning
13 entrance into the boxes at Eastland Bank, so you are
14 saying that Mr. Doherty issued a memo in error that
15 contained 945, and then Mr. Washington on a separate
16 occasion signed in error, Mr. Doherty signed in error
17 and now Mr. Gasparo also signed that part in error?
18 Answer is yes.

19 Let me just explain who some of the
20 parties are over here. Mr. Kirby, branch manager of
21 Eastland Bank. Mr. Doherty was the work-out officer
22 involved at Eastland Bank with the Cumberland loan.
23 Mr. Washington is a person who is involved with
24 Carlos Caetano and Peter Bouvier, two employees or
25 people who were working as agents for Cumberland when

1 these coins were being flipped, that means taken out
2 of the rolls and put into individual plastic holders
3 at Eastland Bank.

4 Your Honor, the stamp listing that John
5 Ponds witnessed was placed in as an exhibit in this
6 hearing in the Bankruptcy Court. And the same list
7 of stamps which was collateral for the Eastland loan,
8 which was last seen in box number 16 at Eastland Bank
9 is currently now missing altogether. It did not
10 appear in the general inventory that was taken by
11 FDIC. And when Mr. Lutes questioned Levitt on the
12 stand about stamps being contained in three by five
13 cards, that were described as lighthouse cards with a
14 black background and a transparent front to them, Mr.
15 Levitt indicated that he did not view these stamps.
16 And the stamps that were at Eastland Bank were housed
17 in those holders.

18 There are two stacks of them and they are
19 part of the Eastland Bank collateral that's listed in
20 Exhibit A, and I believe it's contained in an exhibit
21 that Mr. Lutes gave you just recently listing which
22 coins were in which boxes. It also lists the
23 currency I believe in box 16 and the stamps also in
24 box 16.

25 On June 14th, 1990, in a letter from the

1 creditors committee to Mr. Weingarten states, the
2 members of the committee present at the meeting
3 expressed their concern about allegations that a
4 switching of coins may have taken place at Eastland
5 Bank.

6 In light of these allegations, the
7 committee would like someone or some group to return
8 to the bank and view the coins once more to compare
9 their observations with those originally reported by
10 Sotheby's. The person selected could presumably at
11 the same time undertake the culling process you
12 referred to in your most recent report to segregate
13 coins of the highest grades. The committee is not
14 convinced that Mr. Chorney should now be ousted, but
15 wishes to reserve judgment and position on that point
16 until allegations of switching of coins are
17 conclusively answered. Your Honor, every attempt to
18 bring in an outside party to view these coins was
19 interfered with in many different ways.

20 On May 15th, 1990, a Mr. Hoskins from the
21 International Numismatic Society Grading Service was
22 supposed to have come to view these coins at the
23 Cambridge Meridian Group in Cambridge,
24 Massachusetts.

25 Cumberland paid him \$1,000.00 up front for

1 traveling money to view the coins. When he got
2 there, neither Mr. Baverstam from Cambridge Meridian
3 Group nor Mr. Boyajian were available to let him in
4 to look at the coins and consequently he never did
5 get to look at them.

6 These are the same coins that we wanted
7 verified through a subpoena to FDIC for Mr.
8 Tworkowski, Mr. Leidman, Mr. Moffatt, Mr. August,
9 anybody, to give a third-party independent say-so
10 that those coins in no way matched the Sotheby's
11 appraisal.

12 We are not talking about subjective
13 differences, your Honor; what we are talking about
14 are coins that are not the same year and mint mark as
15 indicated. We are talking about coins that were deep
16 mirror proof-like versus a normal strike, which may
17 sound esoteric to you, but to a professional in the
18 business it would be very, very apparent.

19 On July 6th, 1990, a creditors' committee
20 letter to Patricia Antonelli at the United States
21 Trustee's Office. As you are aware, the debtor in
22 the above-referenced case has made serious
23 allegations that a switching of coins that are in the
24 possession of Eastland Bank may have taken place. In
25 view of these allegations, and the possible

1 ramifications resulting therefrom, the members of the
2 credit committee present at meetings held on June
3 6th, 1990 and July 5th, 1990, have asked that the
4 Federal bureau of Investigation be contacted and
5 asked to conduct an investigation with regard to this
6 matter. It is the belief of the members of the
7 committee present at the aforesaid meetings that an
8 investigation is necessary to fully resolve the
9 issues raised by debtor, thus enabling the committee
10 to better evaluate its position and other matters
11 pending in the case.

12 Your Honor, if you were to contact Mr.
13 Terrence McKenna who was chairman of the creditors'
14 committee, I think he could fill you in on what
15 occurred and how he was threatened.

16 In relationship to the examiner's reports,
17 examiner report number one is dated January 2nd,
18 1990. It values the coins from 1.2 million to 46
19 million dollars in value. And it makes a very valid
20 statement that six percent of the coins equals 46
21 percent of the value. On March 5th, 1990, the
22 valuation is now between five million and fifteen
23 million, excluding on silver dollars. In examiner's
24 report number two to the Court dated April 16th,
25 1990, the value is now 1.4 million to four million.

1 And it appears to me that Mr. Weingarten is making
2 every possible effort to try and conform to the
3 Sotheby's appraisal.

4 During this time period ten coins were
5 sold to Mr. Bellasario for \$4900.00. And also a 202
6 coin random sample was taken which I want to go into
7 in a lot of detail with you, your Honor. Report
8 number three, May 22nd, 1990, the value is now four
9 million to seven point six million. Based upon this
10 202 sample in-house, Mr. Weingarten states that the
11 in-house inventory is worth in excess of three
12 million dollars. This in-house inventory of roughly
13 8,500 coins of which six thousand allegedly were sold
14 through public auction by Christie's and Bowers and
15 Merena for 140,000 is worth \$3,004,040.00 according
16 to the examiner on May 22nd, 1990.

17 In examiner's report number four on June
18 15th, 1990, N-2, because they are calling everybody
19 not by their names, but by -- N-2 was Mr. Augustin
20 that testified at trial, your Honor. A statement is
21 made that the non-redemption coins are higher than
22 the redemption coins as far as their quality. Well,
23 if the non-redemption coins are of higher quality
24 coins then the redeemable coins and the redemption
25 coins averaged at 63.8 as a grade, it would appear to

1 me that you have a very high quality of coins
2 in-house.

3 What I'd like to do is go over some
4 inconsistencies with you concerning the grading, the
5 valuation. Before that, I'd like you to know that
6 prior to May 7th, 1990, the person doing the grading
7 for the government was an individual who was
8 convicted of counterfeiting, and was convicted of
9 counterfeiting rare coins. This is a contract that
10 this individual signed with Mr. Weingarten's
11 associate, Mr. Baverstam who said that they found
12 this man in the Yellow Pages somehow. It is
13 understood that you will exercise your best efforts
14 and judgment in grading the coins. But that you are
15 merely given the company your good faith expert
16 opinion and not guaranteeing that it will be accepted
17 as accurate by the market or another appraiser.

18 Your Honor, I want to talk a little bit
19 about this 200-coin sample with you and then I want
20 to show you what you've probably never seen before in
21 this case, is a full explanation of the 35,000 silver
22 dollars in existence versus the 25,000 that Mr.
23 Posner keeps on telling you existed. A random sample
24 of 200 coins that actually turned out to be a
25 202-coin random sample was taken from the in-house

1 inventory of Cumberland Investment Corporation at 141
2 Main Street, Woonsocket, Rhode Island. This random
3 coin sample was graded by Russell Augustin.

4 He graded over 80 percent of the coins as
5 being MS 63 or better. The average price per coin
6 using May of 1989 values was in excess of \$500.00 per
7 coin. The average price used by the examiner in
8 computing the three million dollars was \$376.00 per
9 coin. The degree of accuracy of this random sample
10 exceeds 90 percent, your Honor, with like a five
11 percent standard deviation factor.

12 You must realize that when they take a
13 poll for presidential elections, they only take a
14 poll of like 500 people. To take a sample of 200
15 coins out of 8,500 coins, you have a pretty accurate
16 sample if it's a truly random sampling.

17 Between May 15th when Mr. Boyajian faxes
18 me the results of this grading by Mr. Augustin, the
19 same lot is looked at by the first appraiser on May
20 18th and within three days coin number 46 ends up
21 missing.

22 Your Honor, in my opinion, there is no way
23 in the world that the coins that Mr. Moffatt and
24 Mr. -- And Mr. Hermann from Ramapo viewed with the
25 exception of the coins in box 945, are the same coins

1 that were at Cumberland Investment Corporation when
2 they were under my control.

3 When you compare some of the things that
4 have happened with the appraisals, you're going to
5 find out that the counts are off in the boxes of the
6 number of pieces in each box at FDIC, both in the
7 silver dollars and in other inventory. Their
8 non-silver dollars are in boxes C-115 and C-117. In
9 addition some assets are dissipating for the
10 following reason. 100,000 of these bank notes were
11 left at 325 Main Street by the trustee when he took
12 over the estate. And my son who's currently in
13 business has been buying some of Cumberland's former
14 assets to the best of my knowledge through the door.
15 What I'd like to do is go over some charts with you.

16 THE COURT: Hold it a minute.

17 (P A U S E)

18 THE COURT: Okay. Go ahead.

19 MR. CHORNEY: Your Honor, Cumberland
20 carried three pools of silver dollar in their
21 inventory, not just one pool as described by the
22 government. There is a Pool A that was carried as MS
23 65 or better. And the Eastland Bank collateral
24 consisted of box 946 with 1,906 coins, safety deposit
25 box 606 with 520 coins, safety box 849 with a 1,040

1 coins, safety deposit box 853 with 1,960 coins,
2 safety box 880 with 2,400 coins. The total Eastland
3 collateral was originally 2,800 -- excuse me 7,826
4 coins. Ten coins were sold by the examiner to pay
5 for expenses in showing these coins to Mr.
6 Bellasario.

7 Somehow or other only six of them are
8 removed from the 7,826 because everybody seems to be
9 carrying 7,820 as the number of coins. Safety
10 deposit box 945 which was also stored at Eastland
11 Bank has 2,066 coins in it. The in-house inventory
12 had 8,601 coins in it, and redemption coins were
13 6,097 coins for the total number of coins in-house
14 after 14,698 coins. The total number of coins in
15 pool A was 24,594 coins. The coins located at
16 People's banks, 6,515 coins. Coins at SAFRA bank in
17 California 120 coins. Both of these banks had fire
18 sales and nobody had to write anything down. There
19 were enough assets to cover whatever the loans were
20 with these banks.

21 Pool B were coins that were uncirculated,
22 but were not MS 65; they were what we were carrying
23 inventory as MS 60 to MS 64, and they were located at
24 141 Main Street also. There were 2,350 of those
25 coins.

1 Pool C which was circulated coins were
2 also at 141 Main Street, 1,771 coins. For the total
3 number of coins of 35,340 silver dollars. Somehow or
4 other during the trial there's all sorts of groups of
5 six thousand coins that people get to see, and there
6 are really three different groups of six thousand
7 coins. And I'll be very frank with you, I didn't
8 know who saw what coins. And there was no
9 identification of who saw what coins or what
10 standards they were using in grading those coins
11 either.

12 I know part of what you're doing recently,
13 your Honor, is trying to figure out the value of some
14 of these assets and I just want to present some
15 information to you concerning these different pools
16 of coins. This first pool of coin of 7,820 coins
17 which everybody seems to agree is worth
18 \$1,388,135.00, would average out to \$177.00 a coin.
19 The coins in box 945 that were also stored at
20 Eastland Bank, but was not under their control,
21 figured out using Mr. Moffatt's grading, and also Mr.
22 Moffatt's grading is right over here, your Honor,
23 those coins in that box was \$373,525.00. Divided out
24 would be in excess of \$182.00 per coin. Leaving
25 what's over here, 3,005 coins sold by Bowers, 3,050

1 coins sold by Christie's, and allegedly 2,546 coins
2 not sold out of this pool A. This was the in-house
3 inventory right over here that Mr. Augustin says is
4 worth \$500.00 a coin, that Mr. Weingarten said was
5 worth \$376.00 a coin, which sold -- which sold at
6 auction by Bowers and Merena at \$21.18 a coin and by
7 Christie's at \$20.30 a coin. Something just doesn't
8 make sense there, your Honor. It doesn't make sense
9 at all.

10 These are -- this is -- the Pool A coins
11 at \$177.00 a coin, \$180.00 a coin. And we contend
12 that these minimum should be \$180.00 a coin deals,
13 are figured right here at \$20.00 a coin. Doesn't
14 make any sense whatsoever, and they are same from the
15 same pool of coins that Mr. Augustin said should have
16 been worth \$500.00 a coin. And statistically with
17 over 90 percent of the grade of confidence.

18 In addition, Mr. Moffatt graded the coins,
19 some redemption coins and he came out with a value of
20 the redemption coins also from Pool A, your Honor, of
21 \$164.00 per coin. This \$164.00 matches pretty
22 closely to this \$180.00 range over here, but in no
23 way do these figures make any sense right over here
24 as to what they sold for. In addition, the People's
25 coin collateral which Eastland Bank said was worth a

1 million dollars plus in their own pleading, and they
2 are the alleged victim in this case, your Honor, that
3 would average out -- let's see, a million -- that
4 would have averaged out to \$153.49 a coin I believe,
5 using the million-dollar figure. And the government
6 I believe would like you to use the figure of \$21.48
7 a coin which is what it received at auction; like one
8 seventh the value.

9 Mr. Manter testified -- well, he really
10 didn't get a chance to testify. We wanted to put an
11 offer of proof on the 28th of February, your Honor.
12 He was willing to testify that -- and put in an
13 affidavit to the effect that a single bag sold for
14 235,000. He's aware that I bought eight bags from
15 Silvertown at \$65,000.00 a bag, which was part of the
16 trial. But then -- then you didn't let the jury hear
17 him I believe. Basically what I'm trying to indicate
18 is the breakdown of these.

19 THE COURT: I think I get your point.

20 MR. CHORNEY: Okay. Fine. There's all
21 sorts of numerical discrepancies with what's going on
22 also, your Honor. There was 2,066 coins in safety
23 deposit box 945. 376 coins as MS 63 or better.
24 Excluding box 945, 3,860 MS 60 coins in safety
25 deposit -- excluding what was in safety deposit box

1 945. 2,344 coins that were circulated. This is
2 using Ramapo's appraisal, your Honor, with a total
3 number of coins that he appraised as 8,646 coins.

4 The Cumberland silver dollars remaining
5 from 141 Main Street in the safety deposit box 945
6 should have been, the 2066 is correct. There was
7 2,546 coins in Pool A not sold, there's 2,350 coins
8 in Pool B, there was 1,771 coins in Pool C for a
9 total of 8,733 coins showing a shortfall of 87 coins;
10 taking the 8,646 from the 8,733. In addition, your
11 Honor, when both Mr. Moffatt and Ramapo allegedly
12 looked at the same coins, they had -- both had 2,066
13 coins in box 945. However, in box 119, Mr. Hermann
14 looked at 614 coins, Mr. Moffatt looked at 1,268
15 coins; same box. So it's all right in their
16 appraisal reports, your Honor.

17 In box C-120, 925 coins for Ramapo, 924
18 coins for Mr. Moffatt. In C-122, 1,441 coins for
19 Ramapo, 1,432 coins for Mr. Moffatt. Box 123, 828
20 coins for Ramapo, 839 coins for Mr. Moffatt, for a
21 difference of 11 coins. Box C-124, Mr. Hermann from
22 Ramapo looked at 1,689 coins, Mr. Moffatt looked at
23 1,025 coins for a difference of 664 coins. Box 126,
24 Mr. Hermann from Ramapo looked at 1,083 coins, Mr.
25 Moffatt looked at 1,091 coins for a difference of 8.

1 The totals came out, however, to only a difference of
2 one coin after everything was all juggled with totals
3 and everything.

4 THE COURT: Okay.

5 MR. CHORNEY: I have a computation on the
6 uncirculated coins, your Honor, for an argument as to
7 what their value should be versus -- and I think it
8 would be worth the Court's time on it.

9 THE COURT: It's up to you.

10 MR. CHORNEY: Okay. Basically, your
11 Honor, to figure out the value, average value of a
12 coin in a lot, it would be necessary to take out the
13 circulated coins from the uncirculated coins before
14 figuring out a value.

15 So for instance, if we were to take a look
16 at the Ramapo appraisal that was adjusted for May of
17 1989, which would have been \$615,854.00, and this is
18 somewhat complicated. But basically what you do is
19 you take the number of circulated pieces 2,348,
20 multiply it times the unit value of-- which is \$12.00
21 for a circulated coin, which would come out to
22 \$28.176.00. Subtract that from the total price or
23 the total value of the circulated and the
24 uncirculated together, ending up with \$587,678.00 as
25 the total value of the uncirculated coins. And then

1 dividing that out by the number of pieces of
2 uncirculated coins which is the 6,298 over here, you
3 would come out with an unit value of \$93.31. It's my
4 contention, your Honor, that the minimum value using
5 the craziest of standards should be like a hundred
6 dollar coin.

7 I want to address with you, your Honor,
8 some of the other issues involved with the
9 collateral, specifically the other assets involved.
10 The other assets are basically in two groupings. The
11 first group was a group of other assets other than
12 silver dollars that were stored at Eastland Bank as
13 part of the Eastland Bank collateral under their
14 physical possession. And the other would be the
15 other assets that were stored elsewhere. Concerning
16 this first group of other assets, that stamp lot
17 which was valued by or signed by Mr. Hollis for
18 \$97,000.00, that's currently missing.

19 That second group which was the currency
20 that Sotheby's had valued at \$20,150.00 on the low
21 side to a high side of 32,000 and change, I believe
22 everybody's agreed it's going to be \$115,000.00. I'm
23 just trying to indicate to your Honor that Sotheby's
24 was off by a factor of times six over here, they're
25 not even close.

1 As far as other assets that were removed
2 from 141 Main Street, the U.S. coins, colonial coins
3 and medals which Mr. Posner stipulated to at trial
4 were worth a quarter of a million dollars when he
5 called Mr. August back in to court to testify again,
6 and these were coins that were -- that Mr. August is
7 a world renown expert in this specific area. Mr.
8 Posner stipulated that those coins were worth a
9 quarter of a million at that point in time. During
10 the course of the bankruptcy, those items sold for
11 the following prices.

12 Bowers sold a group of the currency at
13 \$6,900. Ramapo valued as part of their aggregate
14 figure involving the silver dollars as \$10,460, which
15 Mr. Lutes, by the way, had referred to as that
16 \$13,000.00 figure that Mr. Moffatt came up with. And
17 People's sold \$16,400.00 worth of colonial coinage
18 which would have been a government value of in or
19 about \$33,000.00 that it went at auction, when in
20 actuality it had an appraised value of eight times
21 that amount.

22 The foreign coinage and currency I have
23 listed here. There is U.S. currency which is missing
24 -- I was talking -- I did not work the retail area
25 downstairs, your Honor. I was the CEO of the company

1 and trying to plan out things for the future versus
2 working in the downstairs area. But basically in
3 talking to previous employees of Cumberland, they
4 tell me that there are assets which are conspicuously
5 missing from the list that I showed them. We have
6 some five-hundred and thousand-dollar bills which
7 were in one of the vaults just newly purchased while
8 I was debtor in possession, and those notes have not
9 -- have not appeared to have been sold at auction,
10 nor have they appeared anywhere at all.

11 In addition to that, I -- and I realize
12 that you've already made a finding that the jewelry
13 was worth \$3,000.00. I just have to question -- Mr.
14 Hermann came in at like \$2,000.00 for some currency
15 that was worth two -- one hundred thousand let's
16 say. I have to question without having looked at the
17 jewelry, what the jewelry really was. I don't have
18 any idea about, but what I really do know was that if
19 you take 13 boxes of jewelry, who knows what's in
20 it. And we have no knowledge whatsoever when Mr.
21 Hermann took the stand that he even appraised the
22 jewelry, nor do we know what else he appraised.

23 We also know that there's bags of silver
24 coinage which we had in inventory which are not
25 listed anywhere. And to be very frank with you, all

1 the books and records of Cumberland which would have
2 this information on it are not available to us.

3 We asked Mr. Cullen for it and basically
4 he said everything he had he gave to Mr. Posner. I
5 asked Mr. Lockey for these books which would indicate
6 all the items that were in Cumberland's other
7 inventory. We're talking up to \$600,000.00 as
8 Cumberland's cost, your Honor, where the silver
9 dollars with 2.7 million, I think I explain that to
10 some extent. But these books and records are
11 missing.

12 I went to Mr. Lockey for them. He said he
13 had given all of his records either to Mr. Posner or
14 to the FBI. I have letters which I've written to Ian
15 Murray who was with Ernst & Whinney which is now
16 Peat, Marwick in Canada, and I asked him for copies
17 of these records so that we could see what else was
18 in inventory which is no longer there. And basically
19 he indicated that he didn't know whether or not the
20 records were the property of the U.S. Trustee and he
21 didn't know whether he could get them to me. He
22 checked with his Legal Department. That's been
23 several weeks ago.

24 There are specific coins, and there's
25 202-coin sample which are very identifiable that did

1 not appear in either the Bowers and Merena auction or
2 the Christie's auction, nor did they appear in the
3 coins that were priced up by Ramapo or by Mr.
4 Moffatt.

5 In addition, the post-conversion report
6 from Mr. Cullen that he delivered here the other day
7 that we have been waiting for which has not been
8 filed in the Bankruptcy Court as of the 4th of March,
9 last Friday, we were hoping would contain what was in
10 inventory. We do know that videos of the inventory
11 was taken when Mr. Cullen came in to the premises at
12 141 Main Street. We also know that stenographers
13 were there that took copies of the inventory. I
14 don't think there is anything in writing on it. I
15 can't see how anybody could place a value on an
16 inventory with a bunch of stuff missing.

17 I spent my life building up a business and
18 I'm not about to let other people scavenge on it.
19 This estate in the Bankruptcy Court has been double
20 billed. Anything I tell you, your Honor, I have
21 documentation for. The bills have been padded. I
22 have billings of Mr. Weingarten being in two
23 different places at the same time at \$250.00 an
24 hour.

25 The mere fact that I wouldn't go away

1 really is what brought this criminal deal upon me.
2 Because I feel they are trying to put me away. I
3 feel like I acted in the best interest of the
4 shareholders of Wescap, the creditors of Cumberland,
5 the redemption clients. Nobody's really represented
6 very well on this entire bankruptcy. All I know is
7 the bank is trying to grab coins that belong to other
8 people. I feel all of this has brought down a
9 criminal indictment against me.

10 On the 8th of January 1992 at a hearing in
11 Bankruptcy Court, that Mr. Posner was there, and I'm
12 going to quote page twenty-five, line twenty-two from
13 transcript, it says, yeah, all right, I'll leave the
14 amended language up to the parties. The U.S.
15 Attorney, the trustee, and Mr. Chorney. All right.
16 Question mark. End of quotation.

17 I brought this fact up to the grand jury
18 and Mr. Posner denied it. At the grand jury hearing
19 page 125 Mr. Posner told me that I would not know a
20 party if I tripped over one. If you were to check
21 Mr. Bertozzi's billing on 2/13/92 you will find that
22 there is a conference with Mr. Bertozzi and Mr.
23 Posner, quote, "on Chorney's orders," unquote.

24 At the same 8th of January 1992 hearing
25 the judge says, let me know if there is no more U.S.

1 Attorney and no more grand jury, and then we'll go
2 back to strictly civil.

3 Be aware, your Honor, that during the
4 whole process for some 18 months I was enjoined by an
5 order of the Bankruptcy Court from contacting
6 witnesses in my own defense while these same people
7 were contacting these witnesses. This information
8 was contained in an Anders motion of 11 March 1993
9 with exception of the Edwards and Angell billing of
10 2/13/92. I didn't add that information yet. What
11 I'd like to do at this time, your Honor, is read a
12 new Anders motion to dismiss.

13 MR. POSNER: Your Honor, I'm going to
14 object to that. I don't see the relevancy of that at
15 this point.

16 THE COURT: Mr. Chorney, I'm giving you
17 full rein. We have been at this now for what, three,
18 four hours. I don't know. I didn't keep track. I'll
19 give you full rein. Those motions are filed in this
20 court?

21 MR. CHORNEY: I haven't filed it, your
22 Honor; I have it to give to Mr. Lutes, but I could
23 read it off here if you like.

24 THE COURT: You mean it's a motion you
25 want to file?

1 MR. CHORNEY: Yes.

2 THE COURT: For what purpose?

3 MR. CHORNEY: Basically since I'm not
4 co-counsel I can't file my own motion.

5 THE COURT: Ridiculous. I went through
6 the record here and you got that all wrong. Now,
7 what is that motion about?

8 MR. CHORNEY: It's a motion to dismiss and
9 I have all the reasons down here for it.

10 THE COURT: A motion to dismiss what?

11 MR. CHORNEY: To dismiss the indictment,
12 your Honor.

13 THE COURT: You want to file a motion to
14 dismiss the indictment now, at this date?

15 MR. CHORNEY: Basically I have it with
16 me.

17 THE COURT: File it. Take that, Miss
18 Jackson, and file it.

19 MR. CHORNEY: Let me get the signed copy
20 for you, your Honor. I was going to give it to Mr.
21 Lutes because I can't file it because it was an
22 Anders.

23 THE COURT: That's your conclusion, Mr.
24 Chorney. We'll get to that later.

25 MR. CHORNEY: May I read it?

1 THE COURT: Read it.

2 MR. CHORNEY: Now comes the defendant in
3 the above entitled matter and hereby moves this
4 Honorable Court to dismiss the instant indictment and
5 conviction for violation of defendant's Fourteenth
6 Amendment rights secured to him by the United States
7 Constitution granting him equal protection under the
8 law from the arbitrary enforcement of a law that is
9 constitutionally vague. In support of this motion
10 defendant avers. One, Title 9, Section 961 of FIRREA
11 amended 18 USC 3293 to increase the statute of
12 limitations from five years to ten years for
13 violations of Section 215 and 1014 that in quote,
14 "substantially jeopardizes the safety and soundness
15 of a federally insured financial institution,"
16 unquote.

17 Two, FIERRA was enacted into law on August
18 9th, 1989.

19 Three, the last loan that Cumberland
20 Investment Corporation made with Eastland Bank was on
21 May 30th, 1989.

22 Four, defendant was indicted on May 16th,
23 1992, in violation of U.S.C. 215 and 1014.

24 Five, said indictment claims that
25 defendant may have been in violation of sections of

1 Title 18, 215 and 1014 of the statutes of limitations
2 would have expired on or before 17 -- on or before
3 September 16th, 1987, if the five-year statute were
4 in effect.

5 Six, no testimony was introduced at trial
6 to indicate that the CIC loan substantially
7 jeopardized the safety and soundness of Eastland Bank
8 or Eastland Savings Bank.

9 Seven, testimony at trial did indicate
10 that, A, the assets were under the physical control
11 of Eastland Bank; B, Eastland Bank could have had the
12 assets appraised by whom ever they wished; C,
13 Eastland Bank did choose the appraiser William
14 Tebbetts of Mayflower Coin; D, the minutes of the
15 board of directors' meetings of Eastland Bank
16 required the collateral to be evaluated twice a year
17 by an appraiser of their choice; E, minutes of the
18 board of directors' of Eastland Bank required audited
19 financial statements and Eastland Bank was aware that
20 Thorne, Ernst & Whinney would be doing these audited
21 financials; F, additional assets were not collateral
22 coins were stored at Eastland Bank in box 945 that
23 had substantial value; G, Tom Hollis, senior vice
24 president of Eastland Bank and the principal loan
25 officer involved with Cumberland, relied upon the

1 Richard August appraisal, see the Hollis letter to
2 Gerald Charpentier; H, the auditors of Cumberland,
3 Thorne, Ernst & Whinney also relied upon the
4 appraisals of Richard August and Fall River Coin to
5 verify the Tebbetts' appraisal as being true and
6 accurate. And that in the final analysis the
7 certified audit of Wescap/CIC relied upon by Eastland
8 Bank in turn relied upon the appraisal of Richard
9 August.

10 8, it was not until after the trial that
11 the affidavit of Donald McQueen, dated 16 November
12 1993 is introduced that claims that substantial harm
13 was done to Eastland Bank by the Cumberland loan.

14 9, the claims of Mr. McQueen are suspect
15 in light of the following: A, the collateral coins
16 had not been evaluated on a one-by-one basis since
17 the Sotheby's appraisal.

18 THE COURT: How much longer is that
19 memorandum?

20 MR. CHORNEY: Your Honor, it goes up to
21 15.

22 THE COURT: Let me have it. You can file
23 and I'll look at it right here now. I can go through
24 it a lot faster than you can read it.

25 (P A U S E)

1 THE COURT: Okay. Here you are.

2 MR. CHORNEY: In conclusion, your Honor, I
3 would like to thank you for the opportunity to speak.

4 THE COURT: Let me rule on your motion.
5 First, as to this motion, I will rule on it right
6 away. I deny it and I do not believe it merits any
7 further consideration or any further comment from me
8 other than a summary denial. All right. Now, go
9 ahead. Finish your statement, the allocution
10 statement that I am allowing you to make here.

11 MR. CHORNEY: I want to thank you for the
12 opportunity to speak to the Court, your Honor. I
13 wasn't trying to in any way be disrespectful and
14 taking up a lot of time or whatever. I thought we
15 are dealing with a lot of complex issues here that
16 needed fully explaining to the Court. And once again
17 I want to thank you for the opportunity to address
18 the Court.

19 THE COURT: Do you have anything further
20 you'd like to say? This is the time to say it, Mr.
21 Chorney. I'm giving you whatever time you want to
22 say whatever you want to say.

23 MR. CHORNEY: I just reemphasize that
24 there's never been any intent or attempt to defraud
25 anyone. And that basically that's -- that's been my

1 position on the whole thing. Thank you very much,
2 your Honor.

3 THE COURT: Okay. Well, all right. I
4 guess this brings us right down to the sentencing
5 process itself at this point. First I want to
6 comment about Mr. Chorney's statements concerning his
7 denial for the right to be made co-counsel in this
8 case. I've gone through the transcript on this and
9 he wasn't denied anything. What happened was, when
10 we had the argument on the motion to allow Mr.
11 Chorney to enter his appearance as co-counsel, I made
12 it clear in no uncertain terms that I was not going
13 to have a disruptive trial, that I wanted a smooth
14 trial and that there would be only one person trying
15 this case, not two lawyers, not one conducting part
16 of a direct and the other lawyer coming up and
17 finishing it off with something more that he thought
18 should be and the same as to cross-examination. I
19 made it clear then that there had to be a choice as
20 to who was going to be trial counsel, Mr. Chorney or
21 Mr. Lutes. And if Mr. Chorney wanted to try his
22 case, he was at liberty to do so. And I was told
23 then that, no, Mr. Lutes would be the trier of the
24 case. And then the comment was made about getting
25 cooperation from Mr. Chorney and said I don't think

1 there's anything wrong in him giving me suggestions,
2 Judge. And I responded, who said there was? There
3 was no question he could participate and there was no
4 question he could make whatever suggestions he wanted
5 in the trial so I want to put that at rest.

6 Now, we go onto the sentencing here in the
7 case itself. And I wrote out some comments as I
8 compute the laws. The defendant, who was convicted
9 of bank fraud, now stands before the Court for
10 sentencing. The complexities of numismatology give
11 rise to the important issue at stake. In a
12 fluctuating market, what date is used to assess the
13 value of assets pledged to secure a fraudulently
14 obtained loan.

15 I quote, "In fraudulent loan application
16 cases and contract procurement cases, the loss is the
17 actual loss to the victim or if the loss is not yet
18 come about, the expected loss." For example, if a
19 defendant fraudulently obtains a loan by
20 misrepresenting the value of his assets, the loss is
21 the amount of the loan not repaid at the time of the
22 offense is discovered reduced by the amount the
23 lending institution has recovered (or can expect to
24 recover) from any assets pledged to secure the loan.
25 That's from the United States Sentencing Guidelines

1 2F1.1, application note 7(b).

2 A meticulous determination of the victim's
3 loss is crucial in this case, since it impacts on the
4 mechanical sentencing process imposed on the Court.
5 In this case the jury determined that the defendant
6 had fraudulently obtained a \$2,500,000.00 loan for
7 his coin business, Cumberland Investment
8 Corporation. I need not detail the facts, for the
9 only relevant issue is the value of the assets to be
10 set off against the loss -- against the loan rather.
11 Much has been determined by way of agreement and is
12 best illustrated by the following mathematical
13 calculations. The amount of the loan \$2,500,000.00.
14 There's no dispute about that. We have 7,820 coins,
15 value of \$1,388,135.00 which would bring the economic
16 loss to \$1,111,865.00.

17 We have United States paper currency with
18 a value of \$115,000.00 which would bring down the
19 estimated loss to \$996,865.00. We have stamps at
20 approximately \$50,000.00. And I will go into this in
21 more detail later on, but let us get the items which
22 are at issue in this sentencing process. 8,641
23 silver dollars, foreign currency and coinage, United
24 States coins, proof sets, mint sets, ancients,
25 jewelry, comic can books and so forth. And let me

1 take each one of these in turn.

2 8,641 silver dollars and other United
3 States coins. These coins are in the possession of a
4 trustee in bankruptcy (Cumberland Investment went
5 into bankruptcy prior to this conviction). It is not
6 seriously disputed that these assets must be
7 evaluated for sentencing purposes rather than
8 indefinitely postpone sentencing until the bank does
9 get possession and sells off the coins at issue. The
10 debate centers around an appropriate date for the
11 value assessment. The defendant argues that May 30,
12 1989 should be used since it is the last date nearest
13 the last offense of conviction. The government
14 argues it should be as of the present time.

15 The government argues that the quote,
16 "long delay in the bank's recovery of assets is
17 directly attributable to the extraordinary dilatory
18 tactics of the defendant, both in dealing with the
19 bank regarding Cumberland's loan debt before
20 bankruptcy and during the bankruptcy proceedings
21 themselves. And you can see in re Cumberland
22 Investment Corporation bankruptcy number 89-11051.
23 But for such intentional tactics by the defendant the
24 bank would have recovered on its Cumberland loan loss
25 a long time ago." End quote. Government's brief at

1 page four.

2 The defendant argues that since the
3 government agreed to a May 1989 date for the
4 evaluation of the 7,820 coins at \$1,385,135.00,
5 consistency demands the same date be used to assess
6 the value of all the defendant's assets. Quote, "the
7 defendant contends that May, 1989, the date of the
8 final loan and the date of the agreed upon valuation
9 of the 7,820 coins should be used." End quote.
10 Defendant's brief at page five.

11 I am persuaded by the Government's
12 position. The Government cannot be faulted for
13 agreeing with the defendant as to one or more items
14 and not as to all. The reasons for doing so are
15 within its unique province not to be criticized or
16 reviewed by the Court. The defendant did not have to
17 join the compact; he chose to do so and cannot now be
18 hurt to complain. However, I do believe these silver
19 dollars should be valued as of August 17, 1990, the
20 last date the Trustee in Bankruptcy took physical
21 possession of all the assets, including the silver
22 dollars at issue here.

23 I agree with the Government's argument,
24 quote, "Up to that time the defendant was the debtor
25 in possession of the bankrupt company or estate, and

1 he operated the business while it was in Chapter 11
2 bankruptcy. Defendant could sell or otherwise
3 dispose of the assets of the company.

4 In short, he was in control, and the bank
5 could not recover any of the company's other assets
6 while the defendant operated the business. The
7 possession of Cumberland silver dollar assets by the
8 Trustee on August 17, 1990, insured that the bank
9 could expect to recover money or property in the
10 future that would reduce its loss. The 8,641 silver
11 dollars and other U.S. coins now held by the Trustee
12 should therefore be valued at \$336.951.00, which is
13 the value as of the date the Trustee took possession
14 of them, namely, August 17, 1990, if the present time
15 is not used to determine the valuation."

16 Government's brief at pages four and five. I set the
17 value of these coins, silver dollars at \$336,951.00.

18 Foreign currency and coinage (totaling in
19 excess of 2,000,000 coins stored in bags, and
20 1,000,000 items of foreign paper currency). The
21 record is replete with arguments, but it seems to me,
22 the ultimate question is whether the value should be
23 set as bulk items on a per pound basis or discreetly
24 valued by taking a limited number of coin and
25 currency samples, weighing out a pound, take the

1 catalogue value of one coin multiplied by the number
2 of coins making up the pound to arrive at the
3 catalogue value -- from this, extrapolate the value
4 of the whole lot of coins. This is nothing more than
5 an ingenious device of a clever mind to arrive at an
6 unrealistic, inflated figure.

7 It is clear to me the Government's expert
8 was right on the mark. He stated the coins (made of
9 aluminum, copper and bronze), and currency he
10 examined had no numismatic value, and because of the
11 large volume, only a small number of collectors would
12 be interested in them, thus lowering their value.
13 Since he had no experience dealing with such items,
14 albeit he has been in the coin business 20 years, he
15 contacted dealers who specialize in buying and
16 selling such foreign items in bulk. He learned they
17 are appraised and traded by the pound because of
18 their volume and low value. To do otherwise would
19 not be cost effective. I completely accept his
20 conclusions. I must add that the defendant's expert
21 conceded that his methodology was not the accepted
22 practice in the trade. And it also should be noted
23 that the Government's expert does not know the
24 defendant nor has he ever done business with him.
25 Unlike the defendant's expert, who has known the

1 defendant for many years and has done business with
2 the defendant's son who is also a numismatic dealer.
3 I accept the government's value figure of \$31,455.00
4 as against the defendants of \$200,000.00.

5 Assorted United States coins, Proof Sets,
6 Mint Sets and so forth. By agreement, a sum of
7 \$13,453.10 was arrived at, and I will comment on that
8 later.

9 Next, Jewelry, Comic Books and so forth.
10 Here again, the parties agreed to the sum of
11 \$3,000.00. And so I make the following computation.
12 The amount of the loan is \$2,500,000.00. There were
13 7,820 coins valued at \$1,388,135.00, bringing the
14 economic loss to \$1,111,865.00. The United States
15 paper currency valued at \$115,000.00, reducing the
16 economic loss to \$996,865.00. Stamps at \$50,990.00,
17 reducing the economic loss to \$945,875.00. Trading
18 cards of \$5,000.00, which reduced the loss to
19 \$940,875.00. 8,461 silver dollars, I placed an asset
20 value of \$336,951.00 which reduced the economic loss
21 to \$603,924.00. Foreign currency and coin at
22 \$31,455.00, the economic loss would then be reduced
23 to \$572,469.00. The United States coins, Proof Sets
24 and so forth, value of \$13,453.00. It's agreed that
25 the amount is included in the \$336,951.00 computation

1 above. Jewelry, Comic Books and so forth, \$3,000.00,
2 reducing the economic loss to \$569,469.00. I find
3 the amount of the loss to be \$569,469.00.

4 The Government is urging me to assess
5 against the defendant the sum of \$148,580.00 -- money
6 loaned by Eastland to the Trustee in Bankruptcy as
7 operating costs, and \$250,000.00 paid to Michael
8 Weingarten, appointed by the Bankruptcy Court as an
9 examiner. I accept the defendant's argument that
10 these items constitute consequential damages and
11 therefore should not be used in this sentencing
12 computation, which, Mr. Chorney, brings me to be the
13 sentencing process.

14 I find there is a base offense level of
15 six. There is an economic loss, as I have pointed
16 out of \$569,469.00. I think that's what I said. I'm
17 not sure that's correct. I found the economic loss
18 to be \$569,469.00 so that would increase the level by
19 eight points, and make it at 14 points. I find there
20 was more than minimal planning and I increase it by
21 two full points which brings it to 16 points. I do
22 not give him credit for any acceptance of
23 responsibility, so therefore the adjusted level is
24 16.

25 Now, the Government argues that this

1 criminal history category can be enhanced to a "2"
2 since the category "1" is not representative of past
3 conduct. I reject this position. The government is
4 asking me to assess past criminal conduct against
5 this defendant for what happened in the Bankruptcy
6 Court.

7 As you know, we recessed for approximately
8 one and a half hours and I did consider this proposal
9 by the Government. I do not believe I am mandated by
10 the guidelines to enhance the category. In this case
11 I do not think it should be done. In my opinion,
12 what took place in the Bankruptcy Court, in its own
13 setting, is not of such severity as to warrant the
14 requested enhancement here. So I conclude that the
15 sentencing range is from 21 to 27 months. And Mr.
16 Chorney --

17 MR. CHORNEY: Yes, your Honor.

18 THE COURT: I hereby sentence you on Count
19 V to 27 months. I hereby sentence you on Count VI to
20 two months to run concurrently with Count V. I
21 sentence you on Count VII to 27 months. I sentence
22 you on Count VIII for 27 months to run concurrently
23 with Count V. And on Counts II, III and IV which are
24 Pre-Guideline Counts I sentence you to 24 months in
25 each, concurrent with Count V. I do not assess a

1 fine against you because of your financial
2 statement. I do order you, however, to make
3 restitution to the Federal Deposit Insurance
4 Corporation the amount of \$569,469.00. I place you
5 on supervised release for a period of three years.
6 And I order you to pay a special assessment on seven
7 Counts of \$350.00.

8 I also notify you that you have a right to
9 appeal. You have a right to appeal this sentence
10 which I have just imposed.

11 In addition, since you've gone to trial,
12 you have a right under Federal Rule of Criminal
13 Procedure 32 to appeal your conviction. If you
14 cannot afford an attorney, the Clerk will enter an
15 appeal automatically for you. That's the sentence of
16 the Court and I order that the same be executed.

17 MR. POSNER: Your Honor, I think we may
18 have a problem. I think you said 27 months on the
19 last three counts. I think the maximum is two years.

20 THE COURT: 24 months I said.

21 MR. POSNER: I thought you said 27 months
22 you said 24?

23 THE COURT: I said 24 months. Are you
24 saying you can't give 24 months?

25 MR. POSNER: No, I thought you said 27.

1 I'm sorry.

2 THE COURT: No, I distinctly said 24
3 months.

4 MR. POSNER: I heard the wrong thing. I'm
5 sorry.

6 THE COURT: That's what I have down.
7 Counts II, III and IV Pre-Guideline Counts, 24 months
8 on each concurrent with Count V.

9 That's the sentence of the Court and I
10 order that the same be executed. Yes, sir.

11 MR. LUTES: If your Honor please, at this
12 time, I would ask permission of the Court, it's Mr.
13 Chorney's desire to file an appeal in this matter. I
14 would ask your Honor to entertain my motion to allow
15 him to remain at liberty until such time as an appeal
16 has been determined by the First Circuit. The
17 sentence, your Honor, in light of the voluminous
18 nature of the case and I anticipate the length of the
19 transcript, and the length of time to conduct
20 briefing and to have determination by the First
21 Circuit, I could easily see taking up most of that 27
22 months. And in order to avoid potential irreparable
23 harm and serving a sentence that may later be
24 overturned and perhaps --

25 THE COURT: I'm sorry. I apologize. Go

1 ahead.

2 MR. LUTES: If there ever were to be a
3 retrial in this matter, your Honor, those 27 months
4 could not be taken back. I would ask, your Honor, in
5 light of the fact that Mr. Chorney has always
6 appeared at every scheduled court date, he's always
7 remained in contact with probation, he's been on
8 personal recognizance this entire time even since the
9 return of the guilty verdict, I would ask, your
10 Honor, in light of those factors as well as Mr.
11 Chorney's age and medical condition, that he be
12 allowed to remain at liberty until an appeal has been
13 completed.

14 THE COURT: I meant to add something more
15 to this sentencing. You know, the government is
16 going to be paying in excess of \$28,000.00 as a fee
17 here. And I am assessing that also against this
18 defendant to reimburse the government that amount.
19 And I am also ordering that during his period of
20 probation that he will submit to the Probation Office
21 copies of his tax returns so that an assessment may
22 be made as to his financial condition. And I'm also
23 going to order that there be a periodic investigation
24 of this man's financial condition during his period
25 of probation to determine just where he's getting his

1 money, and what he is doing for a living and so forth
2 and so on, so that I will be alerted to his true
3 economic status. Okay?

4 MR. LUTES: Yes, your Honor.

5 THE COURT: Now we come back to the
6 question of the sentence and your request. Mr.
7 Posner?

8 MR. POSNER: The government would object,
9 your Honor. Simply to say that there is a long
10 transcript and this was a complex case does not meet
11 the burdens of 3143. 3143 says there is a
12 substantial question -- there must be a substantial
13 question of law or fact likely to result in reversal
14 in order for a new trial, a sentence that does not
15 include a term of imprisonment or a reduced sentence
16 to a term of imprisonment less than the total of time
17 already served. I understand from your stenographer
18 and I don't want to quote her, but she indicated that
19 the transcript won't -- she is not starting today
20 with the transcript. The transcript is well on its
21 way to being prepared. We are not talking about a
22 long delay here. He has not met his burden of
23 establishing there's going to be a reversal, a new
24 trial or a term, a sentence that does not include
25 imprisonment or even a reduction, your Honor.

1 THE COURT: Well, that 3142 --

2 MR. POSNER: Three.

3 THE COURT: 18 3142 -- 18 3143, right.

4 Okay. It says, pending appeal where sentence is
5 imprisonment. And it seems to mandate that the
6 judicial officer has to order the defendant be
7 detained unless he or she find by clear and
8 convincing evidence that the defendant is not likely
9 to flee or pose a danger; and I'm not worried about
10 that aspect of it. And it says, and that the appeal
11 is not for the purposes of delay and raises a
12 substantial question of law or fact likely to result
13 in reversal or an order for a new trial. Of course
14 that is not the clearest language in the world and I
15 must admit I, before taking the bench, I have not
16 looked up to see if there have been any case law
17 interpreting the words of that statute, but the big
18 issue is what does it mean by likely? Does it mean
19 probable? As pointed out in some of the guiding
20 literature we have received, there will be almost no
21 cases in which a trial judge could find that an
22 appeal was likely to result in reversal or an order
23 for a new trial.

24 On the other hand, if likely means
25 something less than probable, such as a substantial

1 possibility, well then it becomes easier to find that
2 an appeal is likely to result in reversal, but harder
3 to find that the defendant is not likely to flee or
4 pose a danger. Now, this is a very difficult, this
5 is a very difficult issue that I'm confronted with
6 here. Difficult issue.

7 MR. LUTES: Your Honor, could I add a
8 couple of points?

9 THE COURT: Well, what can you add?

10 MR. LUTES: Your Honor, obviously it's
11 been a very difficult trial. It's been a very
12 difficult sentencing process alone. The defense
13 contends that a lot of these issues are subject to
14 interpretation and depending how some of these
15 figures were interpreted, that could change the
16 sentence involved here.

17 THE COURT: That's okay. I don't worry
18 about that, but that deals with the sentencing.

19 MR. LUTES: Correct.

20 THE COURT: What I want to know is, what
21 substantial question arose in the course of this
22 trial that would make it likely to be overruled on
23 appeal.

24 MR. LUTES: Your Honor, some of the issues
25 that come to mind without an exhaustive analysis of

1 the case, I haven't read the transcript or anything,
2 it's been over six months since the trial, but things
3 that come to mind are issues such as the 11 member
4 jury that returned a verdict. It's kind of an
5 unusual situation, your Honor. I haven't really had
6 an opportunity to fully brief that issue. It was
7 kind of a situation that arose at the very conclusion
8 of the trial. It was an unusual circumstance.

9 THE COURT: I'll give you authority on
10 that right now. On my desk, Betty, there's a little
11 book near the bookends, Recurring Problems in
12 Criminal Cases. Bring it in. All right. What
13 else?

14 MR. LUTES: Mr. Chorney in his allocution
15 raised issues regarding the severance in this case,
16 your Honor. As you know, we filed the motion to
17 sever the bank fraud counts from the mail fraud
18 counts. And the inconsistency of the verdict, even
19 though that alone is not grounds for the reversal I
20 think is significant to the defense's argument that
21 if there had been separate trials as to the mail
22 fraud and the bank fraud counts, perhaps a different
23 result might have been obtained. That's an
24 additional issue, your Honor.

25 THE COURT: Well, I must tell you I don't

1 think both of these issues are worth very much on
2 appeal. Of course, far be it for me to try to divine
3 what the Appellate Court will do. They'll have much
4 more time to analyze the issues and they will also
5 have the benefit of very complete and thought-out
6 briefs. But as I see it now, based on what I
7 remember at the trial and what I know of the evidence
8 and the law, I can't possibly conclude that there
9 would be any success on appeal.

10 MR. LUTES: Your Honor, one additional
11 point.

12 THE COURT: All right. Go ahead.

13 MR. LUTES: Due to the voluminous nature
14 of the case and due to the fact that Mr. Chorney has
15 been a very active participant in his defense, any
16 appeal --

17 THE COURT: I'm glad you said that on the
18 record. I'll verify that I noticed all the times
19 that he kept participating in the course of the trial
20 and the number of times, and time and time again when
21 he kept interrupting you and where you had
22 conferences with him throughout the trial. That's
23 why I felt it was kind of disingenuous of him to
24 raise the issue that he couldn't participate in his
25 trial. If there ever was a blatant incorrect

1 statement, that was it. All right. Go ahead.

2 MR. LUTES: With respect to any possible
3 appeal, your Honor, I anticipate that Mr. Chorney
4 would want to take as active a role in that appeal as
5 he did in trial and just the physical problems posed
6 by this defendant being incarcerated, perhaps at a
7 facility far removed from here would hinder my
8 ability or whoever is appointed to actually prosecute
9 the appeal, that counsel's ability to prosecute the
10 appeal on Mr. Chorney's behalf. And I think he has a
11 very important right in being able to participate in
12 his own appeal. And I would ask on those ground as
13 well, that he be allowed to remain at liberty so that
14 he can assist in the preparation of his -- of his
15 appeal as well, your Honor.

16 THE COURT: Let's go back to this 12
17 member jury bit. Will you please both of you refresh
18 my mind how this came about? I don't recall.

19 MR. POSNER: We gave it to the jury about
20 4:00 o'clock on a Monday. On Tuesday the jury
21 deliberated. None of us knew anything had happened
22 on Tuesday. On Wednesday morning I brought the coins
23 that were exhibits back and found everybody running
24 around, everybody upset and learned that one of the
25 men on the jury, his son, that Tuesday, the day

1 before at a construction accident in Boston was
2 killed, and he did not show up on Wednesday. The
3 issue came up should we continue, should we adjourn,
4 should we wait for him, etcetera.

5 After your Honor consulted the rules in
6 chambers with your law clerk, your Honor found that
7 the rule permitted, if you made certain fact
8 findings, the rule permitted you to go forward with
9 11; and that's what you decided to do. Does that
10 help you recollect?

11 THE COURT: Oh, I remember clearly now.
12 What I do want to refresh my mind on also is what
13 comments were placed on the record by counsel?

14 MR. LUTES: Your Honor, the defense
15 objected to the case proceeding with 11 jurors. We
16 requested that perhaps a recess for a couple of days
17 until this juror could be contacted would be more
18 appropriate. As I recall the situation, the jury was
19 actually asked what they preferred to do, whether
20 they'd rather take a recess and come back in a couple
21 of days, perhaps with Mr. Giguere, I believe his name
22 was, or whether they'd like to just take that
23 particular day off and resume again tomorrow. And
24 the jury said they'd rather resume again the next
25 day.

1 My point, your Honor, is that it's really
2 defendant's privilege as to whether he should be
3 denied the wisdom of that twelfth juror or not. And
4 in this case we contend the decision was left to the
5 jury with no actual findings ever being made that Mr.
6 Giguere would not be available to return to
7 deliberate.

8 THE COURT: We have a question here
9 because Federal Rule of Criminal Procedure 23 B
10 provides, that at any time before a verdict the
11 parties may stipulate in writing with approval of the
12 Court, that the jury shall consist of any number
13 fewer than 12 or in the alternative now, that a valid
14 verdict may be returned by a jury of fewer than 12
15 should the Court find it necessary to excuse one or
16 more jurors for just cause after the trial
17 commences. That was the last provision on which I
18 relied on.

19 Now, so that this was not a question of
20 whether the defendant waived; this was a question of
21 the Court taking it upon itself to go forward with 11
22 jurors because of what happened to the twelfth.

23 Now, I felt that there was just cause. I
24 didn't see in my mind having that twelfth juror come
25 back after having suffered such an unexpected tragic

1 loss of a son, and within a reasonable time from the
2 time of its occurrence to expect him to take his
3 place on this jury and objectively evaluate the
4 case. And therefore I felt the idea was to go
5 forward with 11.

6 And as Mr. Posner points out, I did call
7 the jury and did ask them whether they thought they
8 should go forward now or whether they thought they
9 should wait, and the jury felt that she should go
10 forward and conclude the case. Am I correct?

11 MR. POSNER: Yes.

12 THE COURT: Now, I think that's solid. If
13 it was that the defendant had waived, it may have
14 been a question because a waiver has got to be pretty
15 crystal clear and it should be in writing, and it
16 should be very definitely placed on the record. But
17 we had a very tragic situation take place here.
18 There was commotion all over the place when this
19 happened. There was no question the man was
20 devastated by what had happened. Hey, look, he heard
21 his son was killed, a healthy young man had been
22 killed in a construction accident.

23 MR. LUTES: Your Honor, I understand
24 that's a natural reaction. However, I'm not
25 personally aware of what this particular juror's

1 reaction was. I don't know that he ever was actually
2 ever called, asked how he felt. We don't know if he
3 even had a close relationship with his son, and to
4 what extent this would have affected him. Just
5 having said that, your Honor, I would just state I
6 don't believe the necessary requisites or findings
7 were made to just make the decision to go to --

8 THE COURT: All right. My appellate
9 brethren can decide whether under the facts and
10 circumstances in this case I was justified in going
11 forward with 11 jurors.

12 MR. LUTES: Again, your Honor, the
13 valuation issue for sentencing purposes, if that were
14 decided differently as the defense contends, it could
15 have even resulted in a probationary case. If for
16 some reason the Court of Appeals determines that the
17 sentencing was not calculated properly, that would be
18 grounds for at least a re-sentencing and it could
19 actually result in this defendant serving less time
20 or no time in incarceration. If that were the case,
21 he would have experienced irreparable harm by being
22 incarcerated for the 24 or 27 months. I would just
23 as a precaution to avoid a situation like that, I ask
24 that he be allowed to remain at liberty.

25 MR. POSNER: Your Honor?

1 THE COURT: Yes.

2 MR. POSNER: There is ample evidence on
3 the record to uphold your Honor's finding on whatever
4 date your Honor picked. Your Honor justified his
5 finding on the record and why, and there is ample
6 evidence right on the record to support that. There
7 is no basis to overturn this.

8 THE COURT: On the sentencing?

9 MR. POSNER: That's correct. And again,
10 it's the defendant's burden not -- well, they might
11 do this and then again they might do that and who
12 knows what they'll do. That is not the way 3143
13 reads. It's a presumption that he has to over -- I'm
14 using the term, the language is not presumption, but
15 it's almost like a presumption that he has to
16 overcome. And I would respectfully suggest to your
17 Honor the thought that maybe they will look at this
18 differently does not raise any substantial issues.

19 THE COURT: Mrs. Dafoulas, how long before
20 this transcript will be finished. I'm not trying to
21 hasten you, I just want an approximate date.

22 THE COURT REPORTER: About a month.

23 THE COURT: Some of the rules we have just
24 place a Trial Court in an almost impossible
25 position. Here I am to evaluate, I have to evaluate

1 whether or not this man satisfies the statute.
2 Subjective situation. You know what I think I'll
3 do? I have to evaluate whether it raises a
4 substantial question of law or fact likely to result
5 in reversal or an order for a new trial. Evaluate my
6 own work. As I pointed out, it's a question of how
7 do you interpret likely? I think what I'm going to
8 do is this. It's going on twenty-five of 4:00 now.
9 I won't be able to do it this afternoon. We'll meet
10 here tomorrow morning at 9:30 at which time I will
11 decide and tell you whether or not I will order the
12 sentence immediately executed or place the man on
13 bail pending appeal. I want to check and see if
14 there is any case law that is interpreted what likely
15 means within this 3143 B.

16 MR. POSNER: Judge, can I impose upon the
17 Court, I have a conference tomorrow all day and I'm
18 one of the speakers. Could we make it Friday?

19 THE COURT: Sure. I don't care. It gives
20 me more time. Tomorrow is Thursday. Friday morning
21 at 9:30.

22 MR. LUTES: Thank you.

23 THE COURT: All right. I have imposed the
24 sentence on the defendant. The bail will remain the
25 same. And he's ordered to appear here on Friday

1 morning at 9:30 at which time I will determine
2 whether the sentence is to be immediately executed or
3 to be held in abeyance pending appeal.

4 MR. LUTES: Thank you, your Honor.

5 THE COURT: And I might add, you know, it
6 would help if either of you could give me any
7 authority as to just what they do mean by likely in
8 this 3143 statute. Okay?

9 MR. LUTES: Thank you, your Honor.

10 (R E C E S S)

11 (Resumed at 3:45 p.m.)

12 THE COURT: Thank you. Please be seated.
13 Okay. I have to correct the record on the
14 sentencing, Mr. Chorney. I just said that the
15 sentencing range was 21 to 27 months. And that's not
16 right and it's not wrong. The point is, I can give
17 27 months, but not as I had stated and that is that
18 it falls within the sentencing range. Because the
19 statutory -- the statutory maximum is 24 months.
20 Isn't that it?

21 MR. LUTES: That's correct.

22 MR. POSNER: Correct.

23 THE COURT: 24 months. So, I will
24 reiterate the sentencing that -- and correct the
25 sentencing and state you are hereby sentenced to the

1 custody of the Attorney General or his authorized
2 representatives on Count V for a period of 24
3 months.

4 On Count VI for a period of three months
5 to run consecutive to Count V.

6 On Count VII, 24 months.

7 On Count VIII, 24 months.

8 Count VII and VIII to run concurrently
9 with Count V.

10 And then Counts II, III and IV,
11 Pre-Guideline Counts, 24 months on each to run
12 concurrently with Count V.

13 And the rest of the sentence will be as
14 originally stated. That is, there will be no fine
15 because of your financial statement at the present
16 time.

17 There will be restitution to be paid to
18 the Federal Deposit Insurance Corporation in the
19 amount of \$569,469.00.

20 You are hereby placed on three years
21 supervised release and you are hereby ordered to pay
22 \$50.00 assessment on each count, being seven counts,
23 total amount to \$350.00.

24 I also advise you that you have a right to
25 appeal your sentence and a right to appeal your

1 conviction. And if you don't have any money to do
2 so, Miss Jackson, who is in the office, will
3 automatically enter the appeal for you.

4 And I further direct that during your
5 period of probation that you will submit to the
6 Probation Office copies of your tax returns so that
7 an assessment can be made with your financial
8 condition.

9 That is the sentence of the Court and the
10 Court orders it be executed. However, I suspend the
11 execution until Friday morning so that I may look up
12 and see whether or not there is any case authority on
13 the interpretation of "likely" in the 3143(b)2, I
14 think it is, that we were discussing.

15 Now, I notice someone came to you, Mr.
16 Posner, with some suggestion?

17 MR. POSNER: Well, I was going to say,
18 your Honor, the supervised release, is that to -- to
19 commence upon his release from imprisonment?

20 THE COURT: Absolutely.

21 MR. POSNER: Supervised release is to
22 commence upon his release from imprisonment.

23 MR. POSNER: May I have just a moment?

24 (P A U S E)

25 MR. POSNER: Oh, yes. Your Honor also

1 mentioned the attorney's fees are also supposed to be
2 collected from Mr. Chorney? \$28,000.00 I believe you
3 mentioned too?

4 THE COURT: It's really kind of
5 unrealistic when you come right down to it whether
6 this man is ever going to be able to pay over half a
7 million bucks back to the Federal Deposit Insurance
8 Corporation, but who knows? Maybe he'll hit the
9 lottery.

10 MR. POSNER: You mentioned it. That's the
11 only reason --

12 THE COURT: I'm going to mention it
13 again. I also order that as restitution, but to the
14 government the attorney's fees of \$28,000.00. We'll
15 be getting the tax returns to see whatever his
16 financial condition is and one never knows. Some
17 incredibly unforeseen things could happen which would
18 be a tremendous windfall to him financially that
19 might make it possible for him to pay this back. Who
20 can say? All right?

21 MR. POSNER: Your Honor, I would also like
22 to make the government's memorandums in connection
23 with the various issues including sentencing
24 memorandum part of the record in this case if I may,
25 please?

1 THE COURT: You may.

2 MR. LUTES: Your Honor, I also on behalf
3 of the defendant like to submit my memorandum, my
4 letter of March 4th to the Court as well as my
5 addendum to my memorandum as a full exhibit?

6 THE COURT: Absolutely. No problem at
7 all. All right, Counselors, then I'll see you on --.

8 MR. CHORNEY: Your Honor, may I put in as
9 exhibits copies of what I was showing you for
10 demonstration?

11 THE COURT: What, that you used in
12 allocution?

13 MR. CHORNEY: Yes, sir.

14 THE COURT: This is indicative of what I
15 meant about co-counsel in the case. I could have
16 just seen Mr. Lutes saying two and two equals four,
17 and Mr. Chorney getting up and saying I know, but you
18 have to add one that equals five, then in this case
19 it really is six for some reason or other, and we
20 would have had a turmoil hear and a confusion that no
21 one would have been able to withstand.

22 I don't know of what value they are. They
23 are only valued as demonstrative evidence. We have
24 so much in this case at this point. I suppose -- put
25 it in for what it's worth. I'm not going to oppose

1 it.

2 MR. CHORNEY: Thank you, your Honor.

3 THE COURT: And you gentlemen are going to
4 help the Court to see if you can find anything, an
5 interpretation of this statute as to just what it is
6 by "likely"?

7 MR. LUTES: Yes, your Honor.

8 THE COURT: Here you are, okay.

9 (Adjourned at 3:55 p.m.)

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