IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.

The Per Curium opinion of the United States court of appeals appears at Appendix B to the petition and is "Not for Publication in West's Federal Reporter-Citation Limited Pursuant to 1st Cir. Loc. R. 32.3.

The Summary Judgment opinion of the United States District Court, District of Rhode Island appears at Appendix I to the petition.

The opinion and order of the United States Bankruptcy Court, District of Rhode Island appear at Appendix J and Appendix K to the petition.

JURISDICTION

The Date on which the United States Court of Appeals decided the case was June 20, 2003. A timely petition for rehearing was denied by the United States Court of Appeals on July 18, 2003. A copy of the order denying the rehearing appears at Appendix A. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 704(1). "The trustee shall collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest;

11 U.S.C. § 704(2). "The trustee shall be accountable for all property received."

Historical and Revision Notes, Section 704, Duties of trustee:
The Notes of Committee on the Judiciary, Senate Report No. 95-989, states that,

> "The trustee is responsible to furnish such information concerning the estate and its administration as is requested by a party in interest."

11 U.S.C. §1109(b). "a party in interest, including …a creditor may raise an may appear and be heard on any issue in a case under this chapter."

11 U.S.C. Rule 2014(a). "….The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connection with the debtor, creditors, and other party in interest, their respective attorneys and accountants, the United States Trustee, or any person employed in the office of the United States trustee."

28. U.S.C. Rule 60(b)(4). "Judgment is void as a matter of law under the non-discretionary prong of 60(b)(4) because the court acted in a manner inconsistent with due process."

<u>UNITED STATES CONSTITUTION</u>:

Ninth Amendment to the United States Constitution in part states,

> "the enumeration in the constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

Fourteenth Amendment to the United States Constitution in part states…..

> "….nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. BACKGROUND

This instant appeal is related to two proceedings, one civil and one related criminal case. The civil case has been proceeding over a 13 year period in the District of Rhode Island. Petitioner was the C.E.O. and majority shareholder in a public entity, Wescap Enterprises Limited, (Wescap). Cumberland Investment Corporation, (C.I.C.) was a wholly owned subsidiary of Wescap. Petitioner was the guarantor of a 2.5 million dollar note that C.I.C. had with Eastland Bank, in R.I. The bank was in possession of some of the assets of C.I.C., valued by different appraisers and the company's auditors at over five million dollars. The "possessory" collateral for the 2.5 million dollar note consisted of 7,826 rare U.S. silver dollars, rare U.S. stamps and currency. Subsequently, the following events occurred:

1. On December 5, 1989, C.I.C. was petitioned by Eastland Bank and two other creditors into a bankruptcy proceeding in the District of Rhode Island, Ca. No. 89-11051ANV. The court appointed an Examiner to evaluate the assets of C.I.C.

2. On August 17, 1990, subsequent to several contested hearings, a Chapter 11 Trustee, John F. Cullen was appointed by the court. The Chapter 11 Trustee, with court permission, removed the assets from the premises of

C.I.C. These assets were named the "in-house" assets and the "redemption" client assets. "Redemption" client assets were stored at the premises of C.I.C., but owned by clients of C.I.C. Petitioner was fired. The Trustee then, hired the former Examiner, to assist him in the liquidation of the C.I.C. estate. Yet, statute 11 U.S.C. Section 327(f), specifically states that "The trustee may not employ a person that has served as an examiner in the case."

3. On December 12, 1990, Petitioner, Chapter 11 Trustee, John F. Cullen, Eastland Bank and Gerald Aubin, creditor, entered into an agreement, whereby the Trustee was authorized to borrowed money from the estate for 'administrative expenses' subject to Title 11 U.S.C. Section 364, (the 364 Agreement.) See agreement terms in Appendix H, pgs 161-175.

4. The bankruptcy case was quite contentious. Petitioner and Aubin claimed the Examiner and Chapter 11 Trustee did not provide a proper accounting of the assets of C.I.C. and the use of the proceeds of the 364 Agreement. The Examiner and Trustee claimed the assets were not of high value, as claimed by Petitioner, and made a criminal referral to the U.S. Trustee's office, an adjunct to the Department of Justice.

5. On July 3, 1991, an order was entered by the bankruptcy court stating, that the Petitioner's "standing is as an alleged creditor only, and whose interests as such are adequately represented by the Trustee." Both Aubin

and Petitioner were forbidden by court order to partake in proceeding concerning the sale of the assets. See Appendix H, pages 176-178.

6. Both previous and subsequent to the July 3, 1991, court order, Petitioner had claimed for several years that some of the assets, seized by the Chapter 11 Trustee on August 17, 1990, were conspicuously missing.

7. On June 18, 1992, Petitioner, is ordered to pay $200,000 to the Trustee as "partial reimbursement for deliberate post-petition damage he has done to creditors." Petitioner viewed this fine as being a chilling affect "for his refusal to surrender his right to challenge official misconduct." An appeal of this decision was denied by the District Court, and the Court of Appeals for the First Circuit. The Supreme Court of the United States did not grant Certiorari to Petitioner. See Supreme Court Appeal, Chorney vs. Weingarten, et al, dated January 16, 1994 in Appendix H, pages 197-204.

8. A criminal referral from both Eastland Bank (taken over by F.D.I.C. in December 1990) and the Examiner in Bankruptcy were made and on September 16, 1992, Petitioner was indicted on 1 count—18 USC 371, 10 counts—18 USC 1341 and 7 counts—18 USC 1341. After a six-week jury trial, ending on May 26, 1993, the jury came in with a mixed verdict. Petitioner was acquitted of the 1 count of 18 USC 371, conspiracy to commit bank fraud, and 10 counts of mail fraud, 18 USC 1341, but found guilty of

the 7 counts of bank fraud, under 18 USC 1014, namely making false statements to an F.D.I.C. insured institution.

9. Petitioner and former clients of the petitioner, whose assets were seized but never recovered, repetitively have indicated to the court that assets under the custody and control of Eastland Bank and the trustees in bankruptcy, were missing and/or unaccounted for. Both Petitioner and a former client, an interested party, named Warren Taft, sought to obtain an accounting of the assets, seized on August 17, 1990, and the use of funds from the 364 Agreement, without success. See Appendix H, pages 45-80.

10. On February 23, 1996, subsequent to exhausting various appeals, Petitioner began to serve a 27-month sentence at Allenwood F.P.C. Part of the 'punishment', contested by Petitioner, was a restitution to the alleged victim, for about the sum of $600,000, based upon an alleged shortfall in the value of the assets. The government had valued the "possessory" collateral as being worth 1.2 million dollars, and the in-house inventory as being worth $700,000, thus leaving a shortfall of $600,000, the basis of Petitioner's sentence.

11. On March 6, 1997, while incarcerated, Petitioner filed for a Writ of Certiorari in case no 96-8266, Chorney vs. United States of America, which was not granted. The question presented in this writ was whether the

Petitioner was denied his fundamental right to defend himself. See Appendix H, pages 185-196.

12. On December 7, 1999, the last of the assets, the "possessory" collateral was allegedly sold at public auction.

13. On March 10, 2000, Petitioner was informed by Respondent, Republic Credit Corporation I, that as of 12/8/99, the day following the auction sales, Republic was made the assignee of the interest of FDIC.

14. On November 16, 2001, Petitioner filed a MOTION IN OBJECTION TO DISTRIBUTION FROM THE SALE OF ASSETS PRIOR TO TRUSTEE PROVIDING AN ACCOUNTING OF THE ASSETS.

15. It had been over 3 ½ years since the assets were allegedly sold in this 13 year old bankruptcy case, yet no full accounting of the assets of the estate have been provided to the Petitioner or any other interested party despite continuous requests for this accounting. See Appendix H, pages 90-160.

B. DISCUSSION

Petitioner has repetitively claimed that he could not adequately defend himself because he could not obtain information to corroborate his theories, namely that the "possessory collateral" was not intact and that it had been tampered with, and that the "in-house" inventory had assets that were missing or unaccounted for. The information below is relevant to the

attempts of the Petitioner to defend himself in the context of this appeal:

1. Both the Chapter 11 and 7 Trustees have consistently presented the argument to civil and criminal courts, that the "possessory" collateral was in tact. Trustees also argue that any assets missing from the "in-house" inventory or the coins belonging to the so called "redemption" clients of C.I.C., all seized and removed from premises of C.I.C. on August 17, 1990, were probably missing, prior to the seizure, while in the possession of the Petitioner.

2. The Government and their trial witnesses, adopted the Trustees' same arguments in paragraph 1 above at the criminal trial of the Petitioner.

3. On July 14, 1992, pre-indictment, John Truslow, F.B.I. Special Agent, testified before the Grand Jury and confirmed that the "possessory" collateral was not intact. His testimony on pg. 6 of Appendix H, indicates that some 175 silver dollars were sold from the "possessory" collateral prior to the criminal trial. Assuming that Agent Truslow's statement was true, then possibly tens or hundreds of thousands of dollars in value were sold without notice to the parties in the bankruptcy case, in violation of the accounting requirements of 11 U.S.C. Section 704(1) concerning the distribution of proceeds from this sale.

4. Subsequent to the May 1993 criminal trial, Petitioner, through his own

due diligence, obtained a copy of the transcript, produced by Allied Court Reporters at the request of Eastland Bank, dated August 17, 1990, indicating that the Trustee and numerous parties in his employ were acting "in the context in both civil and criminal investigations" during the removal of assets from C.I.C. Tr. of 8/17/90, page 3. See Appendix H, page 192.

5. The 8/17/90 Transcript also details some of the assets removed by and under the direction of the Chapter 11 Trustee, John F. Cullen. See Appendix H, pgs 1-3.

6. Petitioner, subsequent to the criminal trial, notified Mr. Monzack; the Court; Sheryl Serreze, U.S. Trustee; and the John Fitzgerald, A.U.S.T. at the Boston Regional Office in June and September of 1994, of specific assets from the "in-house" inventory, seized by the Trustee on August 17, 1990, that appeared to be missing or unaccounted for from the estate. The September 94 letters reference the Transcript dated August 17, 1990, which Petitioner supplied to Mr. Monzack. See Appendix H, pages 45-50.

7. The missing and unaccounted for assets, in paragraph 6 above, were from the "in-house" inventory of C.I.C., which is a different inventory from the bank assets in paragraph 3 above. The "in-house" assets, valued between tens and hundreds of thousands of dollars, was not available to be considered by the trial judge in the compilation of Petitioner's sentence and restitution.

8. On December 28, 1994, Petition, and creditors Mr. Nacu, and Mr. Dunleavey, met with Jason Monzack, who was the Chapter 7 Trustee for C.I.C. as well as the Trustee for Eastland Bank. At this meeting Mr. Monzack admitted that there was over $300,000 in assets missing from the estate of C.I.C., but in Mr. Monzack's words, "it's no big deal since the administrative expenses far exceed that figure." See Appendix H, pgs 51-52.

9. Mr. Lutes, court appointed criminal attorney at the May 1993 trial of Petitioner, subsequent to trial, at Petitioner's request and in furtherance of an appeal to the First Circuit Court of Appeals, requested Mr. Monzack to supply him with inventories taken by Mr. Monzack and FDIC, as referred to on page 68 of a February 15, 1996, hearing in bankruptcy court, only eight days before Petitioner was seized at a bail hearing to start serving his sentence. Mr. Monzack never responded to Mr. Lutes concerning this or in subsequent communications. See Appendix H, pages 78-80.

9. On October 19, 1999, Petitioner obtained 19 videotapes, taken at the direction of the Chapter 11 Trustee, Mr. Cullen, in the related civil bankruptcy action. The videotapes were produced to Petitioner as a result of an FOIA to the Executive Office of U.S. Attorneys, concerning the removal on August 17, 1990, of the assets from C.I.C. premises by Mr. Cullen. Said videotapes show Kate Dowling, from the U.S. Trustee's office was

present there on 8/17/90. The Examiner clearly states on video that, "two to three Million Dollars" is the value of one of the truck-loads of C.I.C. assets. This 2-3 million dollar value far exceeds the value stated by government witnesses at trial. A comparison of assets in the Trustees' motion to sell estate assets and the assets contained in the 8/17/90 transcript and the videotapes show that a significant number of assets seized by the Chapter 11 Trustee, were not sold and confirms claims made in par. 6 and 7 above.

10. On April 6, 2000 at a bankruptcy court hearing, Petitioner obtained 'newly discovered' evidence. The alleged victim, Eastland Bank and their successor, FDIC, the Trustees in Bankruptcy and U.S. Attorney's office all knew that the assets, which were evidence in the criminal trial, were indeed not intact as was testified to at trial. See Appendix H, page 10.

11. On December 11, 2000, 'newly discovered', in response to Mr. Taft requesting an explanation into estate asset discrepancies as to why the Trustee requested permission to sell 7,491 silver dollars in the December 1999 auction sale, when the sale allegedly should have contained the "possessory" collateral of 7,816 silver dollars [1], valued by the government at

1. The 'possessory collateral', now contained only 7,816 rare silver dollars. Parties were noticed and with the permission of the bankruptcy court, ten coins of the original 7,826 coins were sold in 1990, for approximately $5,000 to pay for administrative expenses.

1.2 million dollars at Petitioner's criminal trial, but actually contained over 8,000 coins, valued by Christies at less than $300,000. Trustee Monzack reluctantly supplied Mr. Taft various documents, indicating that there were 7,992 silver dollars and not 7,491 silver dollars in this sale. One of these documents was a receipt from the F.B.I. to F.D.I.C., dated 1/8/99, indicating that in addition to a 'possessory collateral' of 7,809 silver dollars, the collateral 'allegedly in tact' and held by Eastland Bank, there were 183 silver dollars receipted from the F.B.I. to be returned to F.D.I.C. No inventory of the 183 silver dollars was provided to Mr. Taft or Petitioner, nor any other paperwork as to when the silver dollars were originally given to the F.B.I. However the documents show discrepancies as to the number of silver dollars in the 'possessory collateral'. See Appendix L.

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12. On January 25, 2001, a hearing was held in bankruptcy court concerning Mr. Taft's Motion to Compel Production from Mr. Monzack. See Appendix D, pages 29-38. Opposing this Motion to Compel was the office of the U.S. Trustee. Despite being notified on several occasions that

1. Government witnesses testified the 'possessory collateral' was intact at his trial in 1993. There was no disclosure that Eastland Bank had segregated 183 silver dollars from any inventory, and placed it under the custody and control of the U.S. Attorney. Can it be that the 183 silver dollars represented the missing 3.8 million dollars from the possessory collateral, once valued at over 5 million dollars or those coins once appraised at thousands of dollars each from the "in-house" assets? Either way, these 183 coins were not available to be considered when computing Petitioner's sentence.

assets of the estate were missing, signed on behalf of J. Christopher Marshall, United States Trustee, in a Motion to Strike Mr. Taft's Motion to Compel states, "The United States Trustee understands that Trustee Monzack…..has liquidated all or substantially all estate assets." See Appendix D, pages 24-27. The Motion to Compel was denied and Mr. Taft was told that he had no standing to bring future motions. See Court Order, presented by Mr. Monzack in Appendix D, page 28.

13. On February 5, 2002, Petitioner sent Requests for Admissions, which still remain unanswered, to Mr. Monzack, concerning the assets and documents of the estate of C.I.C. See Appendix H, pgs.179-184.

14. On February 7, 2002, at a bankruptcy court hearing, 'newly discovered' evidence was obtained that all the assets of the C.I.C. estate, with exception of some 380 silver dollars and three ten thousand dollar bills, 'allegedly' had been sold at the December 7, 1999, auction. Up to this point in time, Petitioner did not know which assets were 'allegedly' sold and which had not been. This is the first official announcement by the Trustee as to which assets have 'allegedly' been sold and which assets have not been sold. See Appendix H, pages 28-9.

1. The Respondent and the Trustee claim that these 380 silver dollars are not of high quality and therefore have a value of only $6,000. The government's own experts graded, allegedly the same coins, as being of higher quality and significantly higher in value.

15. Respondent, Republic Credit Corporation I, represents to the District Court on May 21, 2002, in MEMORANDUM IN SUPPORT OF MOTION OF REPUBLIC BANK TO DISMISS APPEAL OF APPELLANT HAROLD F. CHORNEY, PRO SE an argument similar to the U.S. Trustee in paragraph 12 above, (See Appendix I, page 6.)

> "The Trustee has, with the permission of this Court, liquidated all remaining assets of the Debtor."

Respondent, Republic Bank and the U.S. Trustee have adopted the position of the Chapter 7 Trustee, that the assets have been liquidated (with the permission of the bankruptcy court).

16. On 9/6/02, the U.S. Trustee's office placed a motion to be removed as Appellee in Ca. No. 02-1976 to the First Circuit Court of Appeals, stating, " …. J. Christopher Marshall, the United States Trustee for Region One, moves the Court to remove his former Assistant United States Trustee (Providence, R.I.), Sheryl Serreze, as a named appellee in this appeal, because he did not participate in the proceeding giving rise to the order *sub judice*, and he has no stake in the appeal's ultimate resolution." This motion was subsequently granted by the First Circuit Court of Appeals, despite the arguments presented by the Petitioner. See Appendix C. Petitioner believes that the U.S. Trustee and the Chapter 7 Trustee, are both parties to this case and has placed them on the LIST OF PARTIES. In

addition, Petitioner believes that the granting of the Trustee Motion to be removed as Appellee, was tacit approval of the stance of the Respondent. By statute, the U.S. Trustee is responsible for investigating improprieties with the administration of the estate. Petitioner and others are claiming that assets are missing and are requesting an accounting of assets from the Chapter 7 Trustee. Since the U.S. Trustee stated that they had no stake in the appeal's ultimate resolution, the end result of this ruling fosters a mentality that there is no question concerning missing assets, despite the statutory requirement of the U.S. Trustee to perform an investigation. Petitioner believes and will argue that there is a fundamental defect in the system when the U.S. Trustee failed to perform their fiduciary duties and was not *required* to be a party to the case under appeal with First Circuit Court of Appeals.

C. FIRST CIRCUIT COURT OF APPEALS HAS ENTERED A JUDGMENT IN CONFLICT WITH BANKRUPTCY STATUTES, CONGRESSIONAL INTENT, AND CASE LAW

Petitioner avers that the judgment of the Court of Appeals, stating Petitioner has a lack of standing to ask for an accounting of the assets of the estate, and the money borrowed under 11 U.S.C. Section 364(c)(1) in which the Petitioner is a signatory, and the barring affect of prior final orders and judgments, is in conflict with the fiduciary duties and responsibilities of the

Trustee in Bankruptcy, according to statute. According to 11 U.S.C. Section 704(2), "The Trustee shall be accountable for all property received." and one of the safeguards of the system is that according to 11 U.S.C. Section 1109(b), "A party in interest, including…a creditor….may raise and may appear and be heard on any issue in a case under this chapter." The Notes of Committee on the Judiciary, Senate Report No. 95-989, further states that, "The trustee is responsible to furnish such information concerning the estate and its administration as is requested by a party in interest."

Certainly no one could argue that the Petitioner, with liberty and property interests, is not a party in interest in this instant case. See In Re Davis, 239 B.R. 579 (BAP 10th Cir. 1999) (interpreting the phrase: "party in interest" as being "generally understood to include all persons whose pecuniary interests are directly affected by the bankruptcy proceeding…") Consequently, there is a conflict between the decision of the court and the safety net of the statute, clarified by Senate Report No. 95-989, and case law as to whether Petitioner, an interested party, is entitled to the requested information.[1]

The second prong of the court decision concerns the barring affect of final orders. The Trustee and Respondent rely on one of these final orders, the

1. Petitioner's attempts to obtain discovery about the estate of C.I.C. in 1991, were characterized by the bankruptcy court as a "continuous, deliberate, and unjustified interference with the orderly progress of this bankruptcy case." See Supreme Court Appeal, 1994, in Appendix H, pages 200-204.

July 3, 1991, which in part states,

> "….Chorney, whose standing is as an alleged general creditor only, and whose interests as such are adequately represented by the Trustee."

See Appendix H, page 159.

Petitioner avers that Mr. Monzack cannot represent Petitioner's interests and that the July 3, 1991, court order is contrary to statute because Mr. Monzack failed to disclose that he is not a "disinterested party" in that he has a conflict of interest.

JASON MONZACK REPRESENTS BOTH THE BANK AND THE ESTATE IN A CONFLICT OF INTEREST

Jason D. Monzack, the Chapter 7 Trustee, successor to John F. Cullen, the Chapter 11 Trustee, was appointed to the Cumberland Investment Corporation case on December 23, 1993. See Appendix H page 87. This was less than one year after Mr. Monzack was appointed as Trustee for Eastland Financial Corporation by the same judge on February 18, 1993. See Appendix H page 81. "Professionals employed in bankruptcy cases are subject to "particularly rigorous conflict-of-interest restraints, (See Rome v Braunstein, 19 F.3d 54, 1st Cir. 1994 at 57) whereby they must not evidence "even [an] appearance of impropriety." Id. 58. However in this instant case, there was no disclosure by Mr. Monzack, that he also represented the secured creditor, Eastland Bank, when he was appointed to the C.I.C. case.

MR. MONZACK HAD A FIDUCIARY DUTY TO DISCLOSE BUT FAILED TO DO SO, CONTRARY TO STATUTE

By Mr. Monzack representing both the estate of C.I.C. and also the largest creditor, Eastland Bank, he is no longer a disinterest party. Mr. Monzack had a duty to disclose in his application to the court, but did not. According to statute, 11 U.S.C. Rule 2014(a),

> "…The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connection with the debtor, creditors, and other party in interest, their respective attorneys and accountants, the United States Trustee, or any person employed in the office of the United States trustee."

According to Rome v. Braunstein, 19 F.3d 54 1st 1994, the bankruptcy code has strict standards, imposing particularly rigorous conflict-of-interest restrains, "unique to bankruptcy." See In Re: Cropper Co., 35 B.R. 625 at 629-30 (Bankr.M.D. Ga., 1983.) Because of this non disclosure, Trustee Monzack breached his fiduciary responsibilities. (See In Re: Mailman Steam Carpet Cleaning Corp., (99-1170, 1st Cir. 1999). Trustee Monzack can no longer avoid Petitioner's claims of preferential or fraudulent transactions because of his conflict of interest. The bankruptcy court itself, fails to be a safety net for Petitioner, by not raising the issue concerning apparent conflicts of interest. In Re: Anver Corp., 44 B.R. 617 (Bankr.D.Mass 1984.)

> "once alerted to potential conflict of interest on part of appointed counsel, the bankruptcy court must raise the issue *sua sponte*, in order to safeguard its institutional integrity."

The question is how can Mr. Monzack be a disinterested party when he in effect represents other interests, including Republic Credit Corporation I? Since Mr. Monzack represents the interests of Eastland Bank, when the bank failed and was taken over by F.D.I.C., he then represented the interests of their successor F.D.I.C. When F.D.I.C. assigned their secured interests to Republic Credit Corporation I, in 1999, Mr. Monzack also represented the interests of Republic Creditor Corp. I. See Appendix H, page 171, par. 17, 'successors and assigns' in the Title 11 U.S.C. Section 364 agreement.

FAILURE OF THE U.S. TRUSTEE SYSTEM

One of the safeguards of the bankruptcy court system is the U.S. Trustee system. The U.S. Trustee system, an adjunct to the Justice Department, is charged with the investigation of wrongdoing by a private Trustee, like Mr. Monzack or Mr. Cullen. This whole process is a safeguard built into the system to protect people like the Petitioner and the assets of the estate. A section of the guidelines of the U.S. Trustee Manual, in Chapter 5-7 is entitled, "ALLEGATION INVOLVING LOSS OF ESTATE ASSETS BY A PRIVATE TRUSTEE OR AN EMPLOYEE OR AGENT OF A

PRIVATE TRUSTEE." This entire chapter is contained in Appendix D, pages 21-23. The procedure is to have a prompt investigation when assets of an estate are reported missing or there is the "inability to account for estate assets." There is a fiduciary responsibility to report missing or unaccounted for assets and that certain reports are required.

Petitioner has presented evidence to the court that he has notified the office of the U.S. Trustee and the Trustee in bankruptcy that assets of the estate of C.I.C. were either missing or unaccounted for. See Appendix H, pgs. 45-80.

THE U.S. TRUSTEE SHOULD BE A PARTY TO THIS CASE

On July 21, 1999, Petitioner placed an F.O.I.A. Request with the Executive Office of U.S. Trustees. The E.O.U.S.T. in a response, dated May 4, 2001, indicated that there was no information in their files that an investigation had been commenced. See Appendix D, pages 1-20.

On September 6, 2002, the Unites States Trustee Motion to be Removed as Appellee in Case No. 02-1976 was presented to the First Circuit Court of Appeals stating that his former Assistant U. S. Trustee in Providence, R.I., Sheryl Serreze, should be removed as Appellee in this case and that, "he had no stake in the appeal's ultimate resolution." See Appendix D, page 42.

The First Circuit Court of Appeals granted the removal of Ms. Serreze as Appellee in this case. Contrary to the arguments presented by the U.S.

Trustee, Petitioner avers that Ms. Serreze, formerly an attorney for Eastland Bank in bankruptcy case 89-11051, had a conflict of interest by serving as a U.S. Trustee on this case, before leaving the case to avoid the appearance of impropriety. Ms. Serreze had fiduciary duties to refer an investigation and the U.S. Trustee does have an interest in the ultimate decision of this case, especially in light of the fact that the U.S. Trustee's Office makes the same representation as Respondent, Republic Credit Corporation I, that, "he [Trustee Monzack] has liquidated all or substantially all estate assets."

In sum, it appears as if the U.S. Trustee system has failed their fiduciary responsibility to oversee estate administration and be a system safety net.

D. THE FIRST CIRCUIT COURT OF APPEALS UPHOLDS A VOID JUDGMENT DENYING PETITIONER OF DUE PROCESS OF LAW

A judgment is void as a matter of law under the non-discretionary prong of 28 U.S.C. Rule 60(b)(4). See Carter et al vs. Fenner et al., 136 F.3d 1000, 5th Cir., 1998. This rule states that, "Judgment is void as a matter of law under the non-discretionary prong of 60(b)(4) because the court acted in a manner inconsistent with due process."

> "Under Rule 60(b)(4), this court will generally look toward two factors to determine voidness…stated that a judgment is void only if the court rendering it lacked jurisdiction of the subject matter, or of the parties, or acted in a manner inconsistent with due process of law." Id at 1006.

See New York Life Ins. Co. vs. Brown, 84 F. 3d 137, 142-3.

There are some similarities to the strict requirements of counsel in a criminal case and those under the purview of the bankruptcy statute. According to Cuyler v. Sullivan, 446 U.S. 335, at 349-350, 1980, when an alleged conflict of interest is at issue, actual prejudice need not be established to obtain relief. In Cuyler, the Sixth Amendment right to effective assistance of counsel in a criminal case is violated when an actual conflict of interest adversely affects counsel's representation. Id. 348. Similarly, in this instant civil case, Petitioner is being represented in a bankruptcy proceeding, by Mr. Monzack, who is a court appointed counsel with a conflict of interest. This whole situation is froth with adverse affects. Not only does Mr. Monzack represent the interests of Eastland Bank, F.D.I.C., Republic Credit Corporation I, and the estate of Cumberland Investment Corporation, he also represents the interests of Mr. Cullen, under whose custody and control, the assets involved in both a criminal and civil bankruptcy proceeding have been tampered with and/or are missing. Mr. Monzack, Chapter 7 Trustee, as successor to Mr. Cullen, becomes the transferee or assignee of the Chapter 11 Trustee.

> "Successor trustees, unlike successors of public officers, are regarded as transferees or assignees of all the interests of predecessors, and

> removal of a trustee does not cause abatement." Mosser v Darron, 341 U.S. 267, 271.

In addition to representing the interests of the estate, and allegedly the interests of the creditors and allegedly the interests of Petitioner by court order, Mr. Monzack also represents other interests by employing himself and the firm he works for as counsel to the Trustee, (See Appendix H page 88) which may all be perfectly legal if done in the best interests of the estate. See Title 11 Section 327(d),

> "The court may authorize the trustee to act as accountant or attorney for the estate as such authorization is in the best interest of the estate."

The Trustee, in this set of circumstances, where Petitioner is claiming the Trustee of wrongdoing, cannot lawfully represent two masters. This set of circumstances is more than a veiled "appearance of impropriety." See Rome v. Braunstein, 19 F.3d 54, 1st Cir. 1994 at 57. The Trustee cannot represent the interests of Petitioner and the interests of the estate at the same time, and perform his fiduciary duties, especially in light of known and undisclosed conflicts of interest from representing the interests of Eastland Bank; F.D.I.C.; Respondent, Republic Credit Corporation I; and the former Trustee, John F. Cullen, without denying Petitioner, requesting information on his own behalf, the right to due process. Consequently, the July 3, 1991, court order must be void, because in following the court order, the Trustee

can no longer perform his fiduciary duties, thus the integrity of the system is violated and Petitioner is denied the right to due process of law.

E. PETITIONER WAS DENIED A RIGHT RETAINED BY THE PEOPLE, THE RIGHT TO DEFEND HIMSELF

PRELIMINARY STATEMENT

When Petitioner, seeking an accounting of the estate of C.I.C., criticized the officers of the court for conflicts of interest and other official misconduct, Petitioner was enjoined from contacting witnesses in his own defense in an order of the bankruptcy court, dated 8/23/90. Reference to this court order is made by the U.S. Attorney at a hearing in the bankruptcy court on 1/8/92, prior to the criminal trial. See Appendix H, page 193. At the insistence of the U.S. Attorney, the 8/23/90, court order was modified so that Petitioner could contact witnesses in his own defense for the criminal trial.

Now the Petitioner renews once more his plea that he is being denied the fundamental right to defend himself. The rights of the Petitioner, an accused and convicted defendant in a criminal case, stemming from a referral by parties with conflicts of interest, namely the secured creditor and the bankruptcy court officials, are once again at jeopardy. These parties now seek to deny Petitioner the right to obtain evidence 'in his own defense' concerning issues in his criminal trial, namely that the assets of the estate were not in tact and the assets were missing as Petitioner had claimed at his

criminal trial but lacked the evidence to so prove. Secondly, since the assets were missing and unaccounted for, the amount of 'restitution' to the alleged victim, the secured creditor was calculated on the value of an incomplete inventory.

DUTY OF PETITIONER TO PROTECT HIS INTERESTS

"In our adversary system of justice, each litigant remains under an abiding duty to take the legal steps that are necessary to protect his or her own interests." Cotto v. United States, 993 F.2d 274, 1st Cir. 1993 at 278.

What happens when there is no place for the litigant to turn to due to a fundamental defect in the system, which inherently results in a complete miscarriage of justice? Petitioner believes that such a fundamental defect in the system exists when no one is monitoring the safety nets of the U.S. Trustee system: the statutory code fails, the court is allowed to appoint counsel with a conflict of interest, and parties with property and liberty interests have no standing to seek an accountability of their property, and are barred by previous court orders from participating in the process. Petitioner believes that the wisdom of the founding fathers has a saving grace to this situation, consistent with the rudimentary demands of a fair procedure in our legal system, namely the Ninth Amendment to the U.S. Constitution. According to the ninth amendment, "the enumeration in the constitution of certain rights, shall not be construed to deny or disparage others retained by

the people.

> "Specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."

Griswald v. Connecticut, 381 U.S. 479 at 484 (1965.)

The Penumbra doctrine as stated in Kohl v. U.S., 91 U.S. 367 speaks of

> "The implied powers of the federal government predicated on the Necessary and Proper Clause of the U.S. Const., Article I. Sec. 8(18), permits one implied power to be engrafted on another implied power."

and, "These penumbral rights are protected by one Amendment or a complex of Amendments despite the absence of a specific reference."

Griswald v. Connecticut, at 484.

Petitioner claimed in his Petition for Writ of Certiorari back in 1997, that he was being denied the fundamental right to defend himself. See Appendix H, pages 185-196.

A NINTH AMENDMENT ARGUMENT

The Petitioner, a 'convicted' criminal defendant, claims that he has a constitutional right, namely the Ninth Amendment, protected by his First and Fifth Amendment right to due process, to defend himself by gathering evidence to overturn his conviction. Pre-trial, Petitioner was impeded and deprived of evidence that he was seeking, as evidenced by the production, nearly six years after his trial, of 19 videotapes of the removal of the assets on August 23, 1990, by the Trustee in bankruptcy. Petitioner, for lack of

corrobatering evidence concerning assets that were switched and/or missing, was convicted. Petitioner claims that he is currently being deprived of the right to defend himself and overturn his conviction by obtaining more evidence crucial to his arguments. Many of the obstacles to Petitioner obtaining this evidence lie in the bankruptcy 'arena'. The officers of the bankruptcy court have utilized an order, dated July 3, 1991, appointing a trustee, accused of wrongdoing by the Petitioner, with conflicts of interest and interests adversarial to the Petitioner, to defend the interests of the Petitioner. This process has resulted in years of stonewalling of Petitioner's attempts to gather evidence through the legal process and has undermined the safeguards built into the system to protect him. One of these safeguards, involving the conflict of interest issue, is so uniquely important that in bankruptcy cases by statute, specific parameters are set up that involve full disclosure. See page 16 of this brief, discussing 11 U.S.C. Rule 2014(a). This disclosure requires the applicant to declare his connection with other parties in the bankruptcy, which was not done in this case.

CONSTITUTIONAL PROTECTIONS

The basic and fundamental right to defend oneself, is deep rooted in society. Although the Sixth Amendment right concerning counsel applies only to criminal cases, Cuyler does involve conflict of interest. In Cuyler v.

Sullivan, 446 U.S. 335, at 348, the court stated that effective assistance of counsel is violated when an actual conflict of interest adversely affects counsel's representation.

Subsequent to his criminal trial, Petitioner, no longer is guaranteed counsel at all critical stages of his case in accord with the Sixth Amendment. Yet, he is protected by his penumbral First Amendment right to 'redress of grievance', Fifth Amendment right to 'due process of law', followed by the protections of the Fourteenth Amendment, which insures that he shall not be deprived of life, liberty or property without due process of law, and equal protection under the law. Being handicapped by the appointment of counsel with interests adversarial to his own, to represent his interests is fundamentally unfair and offends a sense of justice.

PETITIONERS CONSTITUTIONAL POWERS ARE USURPED

When the bankruptcy judge, Judge Votolato, appointed the Trustee in bankruptcy to represent Petitioner's interests in this case, and this judge continuously represents that,

"I don't think you [Petitioner] have an interest here that's not represented in other ways…." Tr. 2/7/02, Hearing. See Appendix H, page 18, and

"….you [Petitioner] don't have standing to start looking for discovery at this point on anything." (See Appendix H, page 19), the judge basically usurped

a power belonging to Petitioner. He usurped the same protected power at the 2/7/02 hearing as in the July 3, 1991, court order, and in the August 23, 1990, court order, enjoining Petitioner from contacting former clients. The Judge usurped the protected power of Petitioner to defend himself both pre and post conviction while estate assets, in which Petitioner has a property interest, controlled by court appointed Trustees have seemed to 'disappear'. Because Judge Votolato clearly usurped a power belonging to Petitioner, the judgment is void, and therefore subject to relief under Rule 60(b)(4). See V.T.A., Inc. v. Airco, Inc., 597 F.2d 220 at 224, where the court states, "A judgment is void, and therefore subject to relief under Rule 60(b)(4), *only* if the court that rendered judgment lacked jurisdiction *or* in circumstances in which the court's action amounts to a plain usurpation of power constituting a violation of due process.

In the interests of finality, the concept of void judgments is narrowly construed. See United States v. Berenguer, 821 F.2d 19, 1st Cir. 1987 at 22 and Lubben v. Selective service System Local Board No. 27, 453 F.2d 645, 1st Cir. 1972. A judgment is not void merely because it is or may be erroneous. See V.T.A., Inc. v. Airco, Inc., 597 F.2d at 224 and Lubben at 649. Yet, in this case, there can be little doubt that the protected power to seek redress of grievance, due process, equal protection under the law and

basically the ability of Petitioner to defend himself, has been usurped.

REASONS FOR GRANTING THE WRIT:

Acceptance of the court's ruling in this instant case would place society in jeopardy by denying its citizens due process of law. It would allow a court to appoint an attorney, with known conflicts of interest, adverse to the citizen he is appointed to represent. In this instant case, the very appointment of the Trustee in Bankruptcy as the attorney representing the petitioner in a bankruptcy case, has deprived this petitioner of property interests in the bankruptcy case as well as liberty interests in an associated criminal case, due to acts and omissions of appointed counsel in the bankruptcy case. According to Mooney v. Holohan, 294 U.S. 103 at 112,

> "It is only where an act or omission operates so as to deprive a defendant of notice or so as to deprive him of an opportunity to present such evidence as he has, that it can be said that due process of law has been denied."

In addition, acceptance of the lower court rulings in this instant case would allow the over-riding of existing statutes, with its built in safeguards to protect individual rights.

> "That requirement, in safeguarding the liberty of the citizen against deprivation through action of the State, embodies the fundamental conceptions of justice which lie as the base of our civil and political institutions."

Mooney v. Holohan, 294 U.S. 103 at 112.

The decision of the First Circuit Court of Appeals denies Petitioner his fundamental rights. In order for Petitioner to fully defend himself, he needs to present evidence in the possession of those, who allegedly 'represent' him. But the Trustee, appointed to 'represent' him, will not disclose this evidence, which includes a full and detailed accounting of the assets of the estate of C.I.C., even though required to do so by statute, due to conflicts of interest, while those appointed to oversee the Trustee have turned a blind eye to accountability, justice, and institutional integrity. Neither the court nor the U.S. Trustee system provided Petitioner with the safeguards, built into the system to protect him. When there are no safeguards for an individual with property rights, like Petitioner, to turn to those responsible for the accountability of those property rights in order to obtain a proper accounting of his property, the system is defective and doomed to failure.

CONCLUSION:

Justice and fair play, as well as the apparent need for reform and repair of a defective bankruptcy system, are reasons that the writ of certiorari should be granted.

Respectfully submitted

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HAROLD F. CHORNEY, PRO SE
September 16, 2003