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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 cite 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 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

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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.

Vivian S. Dafoulas, RPR-CM

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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 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