No. 94-1343

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

vs.

HAROLD F. CHORNEY,
Defendant/Appellant

ON APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

BRIEF FOR THE APPELLANT, HAROLD F. CHORNEY.

HAROLD F. CHORNEY,
By His Attorney,

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December 12, 1994

APPENDIX "H"

EXHIBITS

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Petitioner does not currently possess copies of all the exhibits contained on page 38 of Appendix "H".

Enclosed in Appendix "H" Exhibits are copies of the Petitioner's 6th, 5th, and 4th Amendment arguments that were part of Appendix "H", Exhibit B.

Petitioner's 9th Amendment argument is listed separately in Appendix "I".

APPENDIX "H"

EXHIBITS

SIXTH AMENDMENT ARGUMENT

BACKGROUND INFORMATION

1. Cumberland Investment Corporation (CIC), debtor in the U.S. Bankruptcy Court for the District of Rhode Island, Case No 89-11051, is a R.I. corporation, wholly owned by a publicly-traded Canadian corporation, Wescap Enterprises Ltd. (Wescap) CIC had its principal operations at 141 Main Street, Woonsocket, R.I. and was primarily engaged in the sale and purchase of tangible investments like coins and stamps. Defendant Harold F. Chorney was a principal of CIC and is the Chief Operating Officer of Wescap.

2. On May 24, 1990 John Boyajian, sends defendant letter which indicates that he represents CIC only and not Chorney personally and that he wanted to withdraw from the case.

3. On July 9, 1990, Notice of a Hearing concerning an Adversary Proceeding No. 90-1052 is sent to the Attorney General of R.I., U.S. Attorney, Postal Inspector and to other governmental agencies. Notice is sent to John Boyajian, Esq. attorney for CIC and defendant Chorney.

4. Also on July 9, 1990, PLEASE TAKE NOTICE that a hearing will be held on 7/19/90 is sent by the Bankruptcy Court with a cc to the FBI and the agencies listed above.

5. On July 11, 1990 a court order is entered denying John Boyajian's Motion to Withdraw and also stating that "if Mr. Chorney insists on hiring separate, private counsel, he is free to engage the services of any attorney, at his own (and not the debtor's) expense, to represnet his individual interests in this case, whatever they may be."

6. On July 13, 1990, a consumer report critical of CIC is aired over local television Channel 10, stating that CIC was under investigation by the Attorney General's office and the Postal Inspector from Boston.

7. On July 23, 1990 Newspaper articles appear in the Providence Journal and the Woonsocket Call stating that a probe of CIC is in progress and that CIC had "fleeced" investors.

8. On July 25, 1990 a hearing is held in Bankruptcy Court to address the Adversary Proceeding and a Motion to Appoint a Trustee.

9. Mr. Boyajian states at the July 25, 1990 hearing:

> "Your Honor, I do not represent Mr. Chorney, individually. I represent only the Debtor, and so I'd just like it on the record to be clear that in case there's any misperception either by Mr. Chorney or the Court or any party, I represent only the Debtor, and I am not Mr. Chorney's personal attorney." R. 148-9

10. The Court in answer stated:

> "I understand. Let me say, too, that I don't really like the way this case is proceeding. I think that we probably wouldn't be having to go through shenanigans like this if counsel had gotten toghether in any way and exchanged exhibits, informed each other about who the witnesses would be. It's entirely unsatisfactory. I feel partially to blame, but here we are, so let's go ahead." R. 149

11. On July 26, 1990 defendant Chorney is called to testify. He reads the following statement to the Court:

"Your Honor, in light of inaccurate reporting by Channel 10 and the Providence Journal, the production of confidential reports to the U.S. Postal Department the productiion of confidential reports to such agencies as the Attorney General's office, who released inaccurate information to the press that a hundred and forty lawsuits exist against Cumberland when in fact there are are ten, the alleged criminal investigation, the alleged hundred and fifty investor complaints against Cumberland, the fact that the examiner's attorney's law firm also represents Eastland Bank, and the irregularities that are occurring in the makeup of the Unsecured Creditors' Committee, I feel that mob tactics are bein used against me. How do I know that the questions that are to be asked of me have not been supplied by the Attorney Genreal or some agency to get criminal information in a civil guise? In an effort to cooperate I did ask Mr. Furness for a list of the questions yesterday, Your Honor, and he refused. As a learned man of the law, Your Honor, I ask that you protect me. In light of the above, I must ask the Court for a continuance until I can obtain proper representation for myself. In the interim, ..." R. 25

12. The Court:

"Well, I think it's a little--even though we're not talking about large time periods here, but this request for a continuance in order to get yourself counsel. I believe comes too late, so I'm not going to grant your request for a continuance." R. 26

13. Mr. Boyajian:

"Your Honor, again, I would only put on the record I don't represent Mr. Chorney personally, but he is unrepresented by counsel and although I am not a criminal lawyer I am aware that there--there is Supreme Court precedent for the fact that if you answer a question regarding certain matters that you can be deemed to have waived answering many further question and that Mr. Chorney, without being a lawyer, may answer a question which may in effect waive the privilege." R. 27

...."I'm not representing Mr. Chorney, I'm only representing the Debtor, no I will not be objecting on his behalf." R. 27

14. The Court:

"Well, okay. Your comments are on the record. I've made a ruling. Let's proceed." R. 28

15. After defendant Chorney testifies for some time, Mr. Manter testifies. When Mr. Chorney takes the stand again, he states:

"Your Honor, since I was on the stand the last time, my counsel has arrived and I'm under advice from counsel not to testify and to exercise my birth-right of not to be a witness against myself." R. 80

16. Defendant exercises his Fifth Amendment birthright for the rest of the hearing.

17. The court hearing continues on July 30, 1990. Defendant Chorney states:

"Your Honor, I'd like to offer into evidence two exhibits which clearly state that both the attorney general and the Federal Government are presently engaged in an investigation to develop similar charges against myself and Cumberland." R. 8

18. The Court:

"Well, I'm going to do it according to our normal practice and let your attorney bring that out. I'm sure Mr. Boyajian knows what you'd like to say and present." R. 8

19. Defendant Chorney:

"It's my understanding that I represent myself individually and Mr. Boyajian represents the corporation, Your Honor." R. 8

20. The Court:

"O.K. Well, how about Mr. Cicilline, what's his status here this morning?" R. 8

21. Defendant Chorney:

"He represents me as far as criminal potentiality is concerned, Your Honor." R. 8

To fully understand the attorney/client relationships for this hearing, it is necessary to read pages 9, (22)10 (23)and 11 (24) in total.

THE COURT: We talked about that a little bit Friday night and I disagreed with Mr. Cicilline that his appearance can be that narrow and that he does represent you personally in this case, not just on objections based on Fifth Amendment privilege. Right, Mr. Cicilline?

MR. CICILLINE: Well, Your Honor --

THE COURT: I just don't -- you know, I --

MR. CICILLINE: I understand, Judge. I just think the record should be clear. I have never entered my appearance at this bankruptcy proceeding. I mean I have no intention of doing that unless the Court orders me to. I don't have --

THE COURT: Well, I thought you were, and if not, you are so ordered, and it's retroactive. I didn't know that.

MR. CICILLINE: Well, Judge, I would just like that to be over my objection. I don't have any experience in bankruptcy proceedings. This is the first time I've been in this Courtroom. I don't know anything about it and I don't think it would be fair to Mr. Chorney to have me represent him in a bankruptcy proceeding, even personally having absolutely no experience or knowledge of this area. My reason for representing Mr. Chorney was the potential or the at least suggestion by some law enforcement authorities that he might be exposed to some criminal liability. To that extent, I'm

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qualified, but I don't know that Mr. Chorney wants me to represent him in these proceedings and certainly I'm not --

THE COURT: He has no choice. You're his personal lawyer in this case. As I said, I don't cross-examine counsel when they tell me they're here for a client and check whether there's an appearance entered or not, but you were here last week. We had a conference hearing by telephone Friday night. We discussed this exact problem. I didn't think it needed to be a ruling, but it is. I'm just not going to be led around the patch this way. I just -- you know.

MR. CICILLINE: Well, Judge, if the Court is ruling that as a result of my furnishing Mr. Chorney with advice with the assertion of his Fifth Amendment, that as a result of that the Court is ordering me to enter my appearance in a bankruptcy proceeding, I would ask the record to clearly reflect my objection both because Mr. Chorney doesn't desire that, I'm not qualified to do that. I was never retained to do that. I've not entered my appearance to do that. Having said all that, I'm obviously going to comply with whatever the Court orders, but I think the record should be clear for Appellate purposes that Mr. Chorney will not be adequately represented individually in a bankruptcy proceeding by an attorney who's not qualified to do that.

THE COURT: I'm not asking you to make any complicated bankruptcy rulings in his behalf, but I am also not wil-

ling to -- I don't know what the word is for it, but Mr. Chorney was advised probably many times before you ever heard about this case that he should have personal counsel and I did not understand your appearance to be for -- I wouldn't allow it for a limited purpose as you're suggesting and as Mr. Chorney -- in fact what he's trying to do now I think does cover even your version of what you're here for. So I don't want to have Mr. Chorney introducing evidence before he even begins to testify.

THE WITNESS: Excuse me, Your Honor. When was I supposedly advised that I should have personal counsel?

THE COURT: We've talked about this several times, as you ought to remember. Now I'm not going to start giving you dates because I don't have them before me, but don't ask me any more questions, O.K.?

THE WITNESS: Yes, sir.

THE COURT: Let's proceed. If, Mr. Cicilline, you would be more comfortable at counsel table, you're welcome up here because you're a lawyer in the case.

MR. CICILLINE: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. FURNESS:

Q. For identification purposes, Mr. Chorney, what I give you has been marked as Eastland's Exhibit Number 50, which is a April 30th, 1990 letter on Wescap Enterprises, Limited sta-

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25. On August 9, 1990 and order was entered which fired defendant and others and appointed a Trustee to be named.

26. On August 15, 1990 a search and seizure of CIC is done by John Cullen. On August 17, 1990 Cullen is officially made CIC Trustee.

27. On August 23, 1990 there is a court order enjoining defendant from contacting former clients. Furthermore a telephone message is placed on all previous CIC, Wescap, and personal lines stating that:

"Harold Chorney is forbidden to talk about Cumberland business."

28. On November 21, 1991 Attorney John Oster withdraws due to irreconsilable differences-lack of payment.

29. The August 23, 1990 order is modified on March 3, 1992 after a court hearing on January 8, 1992 stating that Chorney can talk to his former clients as long as he does not represent to them that he is currently speaking for CIC.

30. On August 20, 1992 defendant Chorney testifies before the grand jury without the assistance of counsel due to the fact that Mr. Cicilline, his criminal attorney, has not been paid since July of 1990.

31. Some grand jury witnesses were told by the government not to talk to defendant. Some potential witnesses for the defendant were told by the government not to talk to the defendant-time frame of 1991-1992.

32. Defendant Chorney was indicted on September 16, 1992.

SIXTH AMENDMENT ARGUMENT

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

U.S. Constitution, Sixth Amendment

FUNDAMENTAL RIGHTS

All the rights contained in the Sixth Amendment so fundamental that they have been made applicable against state abridgment by the due process clause of the Fourteenth Amendment.

Defendant Chorney avers that the fundamental right guaranteed to him by the Sixth Amendment have been violated. The following is a list of some of these violations:

I. Denial of the right to a speedy trial after being "accused" and deprived of liberty.

II. Deprived of a jury of his peers.

III. Deprived of the ability to confront witnesses.

IV. Impeeded from obtaining witnesses in his favor.

V. Denied the assistance of Counsel for his defense at all critical stages.

I. RIGHT TO A SPEEDY TRIAL

Defendant Chorney alleges that he was denied the right to a speedy trial in light of the fact that the Examiner' Report #2, dated 16 April 1990 was in fact an accusation of criminal fraud. Further accusactions appear in the media on July 13 and 23.

Defendant alleges that the preindictment delay was used by the government to gain a tactical advantage. (See Fifth Amendment Argument.)

> "Long delay will impair the ability of the accused to defend himself."
>
> U.S. v Ewell, 383 U.S. 116 at 120 (1966)

Since the government must have become aware of the relevant facts back in 1990, the defense of the case is bound to have been seriously prejudiced by the delay of three years in bringing the prosecution that should have been brought in 1990 or at the very latest 1991.

The protection afforded by this Sixth Amendment guarantee

> "is activated only when a criminal prosecution has begun and extends only to those persons who have been "accused" in the course of that prosecution."
>
> U.S. v Marion, 404 U.S. 307 at 313

Since the meaning of "prosecution" is used to designate the federal government as the party proceeding in a criminal action, and since the judge made the A.U.S.A. a party to the bankruptcy, defendant considers various bankruptcy hearings as being de facto criminal as well as civil.

Statements at the January 8, 1992 Bankruptcy hearing lend credence to defendant Chorney's argument.

MR. POSNER: Do you wish us to file an amended order, or an amendment--an order amending this portion of it?

THE COURT: Okay. Before we leave this, if you decide, for whatever reasons, that there's no more U.S. Attorney or grand jury involvement and we're back to strictly civil, let me know, because then we'll go back to civil--R. 26

> "Invocation of the right need not await indictment, information, or other formal charge but begins with the actual restraints imposed by arrest if it preceedes the formal preferring of charges."
>
> U.S. v Marion, 404 U.S. 307 at 320, 322

Defendant Chorney was placed under armed guard in July, 1990 that lasted until August 21, 1990-four days after the assets of CIC were removed from the premises at 141 Main Street, Woonsocket, R.I. on August 17, 1990.

Since defendant Chorney's liberty was deprived by legal authority while these armed guards who worked for Eastland Bank were present, defendant Chorney considers himself to be under arrest during their presence.

Defendant Chorney has been accused of crimes but never tried resulting in the loss of the protection afforded him as a citizen.

> "..the protection underlying the right to a speedy trial may be denied when a citizen is damned by clandestine innuendo and never given the chance to promptly defend himself in a court of law. Those who are accused of crime but never tried may lose their jobs or their positions of responsibility, or become outcasts in their communities."
>
> U.S. v Marion, 404 U.S. 307 at 331

> "The right to a speedy trial which we have characterized "as fundamental as any of the rights secured by the Sixth Amendment," Klopfer v North Carolina, 386 U.S. 213, 223, protects several demands of criminal justice: the prevention of undue delay and oppressive incarceration prior to trial; the reduction of anxiety and concern accompanying public accusation; and limiting the possibilities that long delay will impair the ability of an accused to defend himself."
>
> U.S. v Marion, 404 U.S. 307 at 330

All the demands requiring protection of the criminal justice system present in Klopfer with exception of the oppressive incarceration prior to trial are present in the Chorney case.

Present in the Chorney case is undue delay of 26 months from when the newspaper articles accused defendant of wrongdoing, 29 months from the Examiner Report #2. The anxioty and concerns of a public accusation accompanied by the long delay have certainly impaired the ability of Chorney to defend himself.

(See Chorney Fifth Amendment Arguments)

II. RIGHT TO TRIAL BY IMPARTIAL JURY OF HIS PEERS

"The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitution knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitution strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt overzealous prosecutor and against the complaint, biased, or eccentric judge....The jury trial provisions...reflect a fundamental decision about the exercise of official power--a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power...found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence."

Duncan v Louisiana, 391 U.S. 145, at 155-156 (1968)

Defendant Chorney avers that the jury choosen on February 8, 1993 appears to be fair and impartial, however, it is certainly not composed of his peers.

Defendant Chorney avers that there are no corporate presidents, CEO's or coin or precious metals dealers on this jury. Although one of the alternate jurors is self employed there are no other self employed jurors.

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III & IV RIGHT TO INTERVIEW WITNESSES

> "A defendant has the right to formulate his defense uninhibited by government conduct that, in effect, prevents him from interviewing witnesses who may be involved and from determining whether he will subpoena and call them to his defense."
>
> U.S. v Tsutagawa, 500 F2d 420 at 421

In effect, defendant Chorney had been enjoined from contacting potential witnesses on August 23, 1990 by the same judge who referred the criminal matter to the U.S. Attorney.

At a Bankruptcy hearing on January 8, 1992 the following testimony occurred:

THE COURT: Why do you have to talk to customers, Mr. Chorney?
CHORNEY: Basic--
THE COURT: Because if I had my druthers, I'd rather not have you in touch with them.
CHORNEY: Basically, Your Honor, I'm being accused of various things and I'm not being given the opportunity to defend myself. R. 23

MR. POSNER: I don't think, from a criminal standpoint, legally it would be appropriate for Mr. Chorney to be precluded from contacting potential witnesses in a criminal case.
THE COURT: You think that would hurt your prosecution?
MR. POSNER: I think it would almost be unconstitutional. First of all, these witnesses don't belong to anybody. The Supreme Court and the Circuits have said witnesses don't belong to either side. They're witnesses, and they're free to talk to or not talk to either side. I appreciate what has gone on from what I've been told, and I understand that some of these people may not wish to talk to Mr. Chorney. That is their prerogative. They can talk to him or not talk to him. But to preclude him by court order from at least attempting to talk to these people who may or may not be witnesses, I think down the road could effectively hamper if not completely prejudice the government in its attempt--either in the investigation or if the investigation culminates in an indictment, in the prosecution of the case. All he has to say is, "Your Honor, I could never talk to these people. I was precluded by a court order of the Bankruptcy court from ever talking to these potential witnesses. I have a right to talk to them."..... So I think, from a legal point of view and from our point of view, we would join in the request that A be amended--not deleted but amended.....
THE COURT: Yeah. All right. I'll leave the amendment language to the parties, the U.S. Attorney, the Trustee, and Mr. Chorney, all right? R. 25

MR. POSNER: Do you wish us to file an amended order, or an amendment--an order amending this portion of it?
THE COURT: Okay. Before we leave this, if you decide, for whatever reasons, that there's no more U.S. Attorney or grand jury involvement and we're back to strictly civil, let me know, because then we'll go back to civil-- R. 26

Defendant Chorney had been enjoined from contacting potential witnesses from August 23, 1990 until March 5, 1992 when the court order was modified.

The fact that this right, the right to confront witnesses, appears in the Sixth Amendment of our Bill or Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution.

Pointer v U.S., 380 U.S. 400 at 404 (1964)

This was not the first instance where Judge Votolato interfered with defendant's right to interview witnesses. On July 25, 1990 during a hearing to appoint a Trustee, a witness under direct examination is interupted by the following:

MR. FURNESS: Can I have one minute, Your Honor, please? (long pause)
Mr BERTOZZI: May I approach the bench, Your Honor? (Low-voiced whispering at bench)
MR. FURNESS: Your honor, if I may disrupt things for a moment, there's a gnetleman outside that we had asked to come to testify; and I already spoke with counsel about breaking up Mr. Weingarten's testimony to allow him to testify. I now find out that Mr. Chorney and some of his people are out talking to the gentleman, and he may decide not to testify. What I'd like to be able to do before they're able to change his mind in any fashion I'd like him to be able to come in and give fifteen minutes of testimony if that's possible because I think if we wait till the end of Mr. Weingarten's testimony, this gentleman won't testify; and his testimony is very important. R. 101

After long pauses and low whispering, see record pgs 101-2, the unsubpoened witness is invited into the court room. The end result being that defendant was prevented from talking to this potential witness with or without the assistance of counsel during this critical procedural part of the hearing.

In U.S. v Callahan, 371 F2d 658 at 660 it clearly states that witnesses don't belong to either side.

"Both sides have the right to interview witnesses before trial."

The U.S. Attorney and agencies were contactig the same potential witnesses in a parallel investigation with the bankruptcy court while the defendant was unable to contact these same potential witnesses.

In addition, the former telephone lines of CIC, Chorney, FPC and Wescap were all fowarded to the offices of Mr. Bertozzi, counsel for the Trustee. A recording was placed on each line which stated:

"Harold Chorney is forbidden by Court Order to talk about Cumberland business.."

Clients as well as non-clients of CIC who attempted to call Chorney and heard this recording felt that they were not allowed to talk to defendant Chorney by law.

Some potential witnesses have been told that they were not allowed to talk

with the defendant. William Tebbetts was under this misconception since summer of 1991 when defendant called him at Worthy Coin and Tebbetts said:

"I'm not supposed to talk to you."

George Manter was told by John Cullen not to contact Chorney, while other potential witnesses are receiveing threatening statements from governmental agencies.

1. In an interview with Rose Erickson, Postal Inspector and FBI told her that they were out to get her.

2. John Truslow of the FBI has made representations to Peter Lockey, defendant's former accountant, that he was going to have problems with the IRS if he did not cooperate. Mr. Lockey made this statement to defendant on a conference call with attorney Bill Waller from Denver.

to be able to do before they're able to change his mind in any fashion I'd like him to be able to come in and give fifteen minutes of testimony if that's possible because I think if we wait till the end of Mr. Weingarten's testimony, this gentleman won't testify; and his testimony is very important.

THE COURT: Is there any objection to interrupting Mr. Weingarten's testimony for somebody else?

MR. BOYAJIAN: No objection, Your Honor.

THE COURT: Is that the only reason that you're afraid that this witness will be --

MR. FURNESS: Yes, Your Honor.

THE COURT: Is he under subpoena?

MR. FURNESS: No.

MR. BOYAJIAN: I'm sorry. Could I have a second, Your Honor?

(Long pause)

MR. FURNESS: Your Honor, if I may, John, the gentleman is a postpetition purchaser who we just met. That's why he wasn't subpoenaed. I met him -- he was waiting here at the end of the recess for me. That's why I think his testimony is very important.

MR. BOYAJIAN: I'm sorry, I'm not through yet, Your Honor. May I have a minute more?

THE COURT: Do you want to invite this gentleman inside so that while we resolve this we won't -- why don't we

just do that.

MR. FURNESS: Do you have a problem with that?

MR. BOYAJIAN: The Judge ordered it, Peter.

THE COURT: I'm just asking him to step inside --

MR. BOYAJIAN: Well, I'm -- I --

THE COURT: -- maybe for no reason but possibly --

MR. BOYAJIAN: Judge, I don't have any objection to interrupting Mr. Weingarten.

THE COURT: Okay, fine, bring him in. Step down for a while, Mr. Weingarten.

(Long pause)

MR. BOYAJIAN: Your Honor, Mr. Furness -- I'll wait till he gets back. (Long pause with low-voiced whispering) Your Honor --

MR. FURNESS: Go ahead, John.

MR. BOYAJIAN: To the extent that Mr. Furness's comments imply that my client was doing anything improper, I think they should not be --

THE COURT: I did not infer that. I can assure you--

MR. BOYAJIAN: Nor is there any evidence that because of my client talking to a potential witness that he wouldn't testify. I mean there's no prohibition --

THE COURT: I didn't see any basis for that. The on -- I asked out of caution to isolate the witness from anybody, and there's no inference drawn that there was anything improper

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V RIGHT TO COUNSEL

Accused. The generic name for the defendant in a criminal case.

Black's Law Dictionary, Fifth Edition

Critical stage. Critical stage in a criminal proceeding at which accused in entitled to counsel is one in which a defendant's rights may be lost, defenses waived, priveleges claimed or waived, or in which the outcome of the case is otherwise substantially affected.

Mempa v Rhay, 389 U.S. 128

In U.S. v Ash, 413 U.S. 300, the Court redefined and modified the "critical stage" analysis by which it determines when the assistance of counsel is required for an indicted defendant prior to trial. According to the Court, the "core purpose" of the grarantee of counsel is to assure assistance at trial "when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." But assistance would be less than meaningful in light of developments in criminal investigation and procedure if it were limited to the formal trial itself; therefore, counsel is compelled at "pretrial events that might appropriately be considered to be parts of the trial itself. At these newly emerging and significant events, the accused was confronted, just as at trial, by the procedural system, or by his expert adversary, or by both."

U.S. v Ash, 413 U.S. 300 at 326, 338-344

> "The fundamental premise underlying all of this Court's decisions holding the right to counsel applicable at 'critical' pretrial proceedings, is that a 'stage' of the prosecution must be deemed 'critical' for the purposes of the Sixth Amendment if it is one at which the presence of counsel is necessary 'to protect the fairness of the trial itself."

U.S. v Ash, Id 339

> "The right to counsel does not attach until at or after the initiation of adversary judicial criminal proceedings--whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."

Kirby v Illinos, 406 U.S. 682 at 689

Defendant Chorney alleges that the July, 1990 hearings in bankruptcy court were in affect adversary judicial criminal proceedings at which he was not represented by counsel at all critical stages.

Chorney alleges that he was intentionally denied a continuance to obtain criminal counsel, a suggestion made to him by corporate counsel John Boyajian that very day, when Judge Votolato who had referred the 'criminal matter' to the U.S. Attorney and responded after defendant stated,

> "...As a learned man of the law, Your Honor, I ask that you protect me."

at which time Judge Votolato responded,

> "...but this request for a continuance in order to get yourself counsel. I believe comes too late, so I'm not going to grant your request for a continuance." R. 26

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DISMISSAL OF THE INDICTMENT

In summary, the defendant has been accused of being a criminal without having all of the fundamental rights that are guaranteed in the Sixth Amendment to protect himself. It would appear that a "criminal" would be afforded more rights than the accused.

The government's actions, as in Rochin v California, 342 U.S. 165 at 169-172, are in such a way as to shock the conscience" through behavior which offends a "sense of justice" or runs counter to the "decencies of civilized conduct."

The present indictment should be dismissed based upon the supervisory powers of this court due to violations of the "fundamental" rights of the accused.

> "Arguments to dismiss indictment not based on constitutional due process considerstion but on concepts of "fundamental unfairness" and hence presume on the courts supervisory powers."
>
> U.S. v Estepa 471 F2d 1132 (2nd Cir 1972)

E522

U.S. V MARION		CHORNEY
	Accusation	
Oct, 67	Newspaper articles, accusing	Apr, 1990 Examiner's Report #2
Jun, 68	Delivery of Documents to A.U.S.A.	July, 1990
Sep, 69	Grand Jury Empannelled	Jan , 1991
Mar, 70	Became aware of grand jury	?????
Apr, 70	Indictment (30 mo from article)	Oct, 1991
May, 70	Motion to Dismiss	Sep, 1992 (26 mo from article)

The May 5, 1970 motion to dismiss the indictment "for failure to commence prosecution of the alleged offenses charged therein within such time as to afford them their rights to due process of law and to a speedy trial under the Fifth and Sixth Amendments to the Constitution of the U.S."

No specific prejudice was claimed or demonstrated. The District Court judge dismissed the indictment for "lack of speedy prosecution" and remarked,

> "since the Government must have become aware of the relevant facts in 1967, the defense of the case "is bound to have been seriously prejudiced by the delay of at least some three years in bringing the prosecution that should have been brought in 1967, or at the very latest early 1968."

In Chorney, since the government must have become aware of the relevant facts back in 1990, the defense of the case is bound to have been serioulsy prejudiced by the delay of three years in bringing the prosecution that should have been brought in 1990 or at the very latest 1991.

The government appealed directly to the Supreme Court that overturned the lower court.

The motion to dismiss rested on grounds that had nothing to do with guilt or innocence or the truth of the allegations in the indictment but was rather, a plea in the nature of confession and avoidance, that is where the defendant does not deny that he has committed the acts alleged and that the acts were a crime but instead pleads that he cannot be prosecuted because of some extraneous factor, such as the running of the statute of limitations or the denial of a speedy trial.

In the Chorney case, defendant maintains his innocence, stating that no crimes have been committed, that there was no conspiracy, that the bank failed to do its due dilligence, that there was no mail fraud, that the coin marketplace had changed and that there was no willful and knowing fraud in the sale of coins to clients.

In Marion the first formal act in the criminal prosecution of those appellees was the indictment.

In Chorney, the first formal act was the Examiner's Report #2 which was under seal and then released from in the judges possession only to various law enforcement agencies. The report was dated April 16, 1990.

Ground for dismissal, Federal Rule of Criminal Procedure 48(b):

> "If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary in bringing a defendant to trial, the court may dismiss the indictment, informtion or complaint."

E523

48 (b) limited to post arrest-see arrest argument.

In Marion the indictment occurred 2-3 months after the grand jury was enpanneled.

In Chorney the indictment occurred more than 18 months from when the grand jury was enpannelled. In fact the indictment was by a second grand jury.

Preindictment delay will justify dismissal relevant only on the issue of whether the defendant had been denied a fair trial.

U.S. v Provo, 350 U.S. 857 (1955)

In Marion, the court states:

> "But we decline to extend the reach of the amendment to the period prior to arrest. Until this event occurs, a citizen suffers no restraints on his liberty and is not the subject of public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer. Passage of time, whether before or after arrest, may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with his ability to defend himself."

U.S. v Marion, 404 U.S. 307 at 321

In the Chorney case, there were restraints on Chorney's liberty in July 1990. Chorney was directly the subject of public accusation, unlike Marion who was list with a group of other businesses as an example of parties commiting a possible wrongdoing. The major difference however, is the fact that Chorney was deprived of witnesses and otherwise interfered with his ability to defend himself when he was enjoined from contacting same for a period in excess of 18 months. Chorney alleges that he cannot have a fair trial because of the foregoing.

> "The right to a speedy trial which we have characterized "as fundamental as any of the rights secured by the Sixth Amendment," Klopfer v North Carolina, 386 U.S. 213, 223, protects several demands of criminal justice: the prevention of undue delay and oppressive incarceration prior to trial; the reduction of anxiety and concern accompanying public accusation; and limiting the possibilities that long delay will impair the ability of an accused to defend himself."

U.S. v Marion, 404 U.S. 307 at 330

All the demands requiring protection of the criminal justice system present in Klopfer with exception of the oppressive incarceration prior to trial are present in the Chorney case.

Present in the Chorney case is undue delay of 26 months from when the newspaper articles accused defendant of wrongdoing, 29 months from the Examiner Report #2. The anxioty and concerns of a public accusation accompanied by the long delay have certainly impaired the ability of Chorney to defend himself.

(See Chorney Fifth Amendment Arguments)

FIFTH AMENDMENT ARGUMENT-DENIAL OF DUE PROCESS

"Aside from all else, 'due process' means fundamental fairness."

Pinkerton v Farr, 220 S.E. 2d 682 at 687

In State v Horn, 566 P.2d 1378 it is stated that:

> "The right of the accused to present matters in his defense is one of the fundamentals inherent in the due process guarantee of a fair trial.

Expanding on Horn, in U.S. v Tsutagawa, 500 F2d 420 at 421:

> "A defendant has the right to formulate his defense uninhibited by government conduct that, in effect, prevents him from interviewing witnesses who may be involved and from determining whether he will subpoena and call them to his defense."

In this present case, defendent Chorney's due process rights have veen violated both pre-indictment as well as post indictment and the same word that was used to characterize the deliberate and ill-motivated attempts by Government to weaken the accused's defense by long delay in Golden is applicable here also, and that word is "outrageous".

> See United State v Golden, 436 F2d 941, 945 as stated in U.S. v Naftalin 534 Fed 770 at 774.

BACKGROUND OF CASE

In December 1989, Defendant Chorney, principal of a company called Cumberland Investment Corporation filed a Chapter 11 Bankruptcy proceding in R.I. after CIC had been petitioned into a Chapter 7. On August 9, 1990 Chorney was fired amist allegations of wrongdoing including fraud. On August 17, 1990 a Trustee is appointed to run the company. Two days earlier, on August 15, 1990 the Trustee conducts a search and seizure, over the objection of Chorney who was present and then tells Chorney that he is with the Justice Department and is there to conduct a criminal investigation and that Chorney should confess now and that he was going to served between 3 and 5 years. Also present was Lee Blais, a private detective working for the Trustee John Cullen and John Dougherty, Vice President of Eastland Bank a major secured creditor of Cumberland Investment Corporation. (CIC)

I. Pre-Indictment Violations

> "Due process may be denied in cases involving preindictment delay where government has delibertly utilized delay to strengthen its position by weakening that of defendant."

U.S. v Golden 436 F2d 941

In order to impair the ability of Chorney to mount an effective defense, the government strategized to delay the indictment to gain a tactical advantage.

In U.S. v Daley, 454 F2d 505 (1st Cir. 1972) it was held that: E 525

> "only where preindictment delay causes actual prejudice and is intentionally employed by the government to gain a tactical advantage does such delay ripen into a due process violation. Id at 508.

"Proof of actual prejudice makes a due process claim concrete and ripe for adjudication...Proof of prejudice is generally a necessary but not sufficient element of a due process claim....The due process inquiry must consider the reasons for the delay as well as the prejudice to the accused.

U.S. v Lovasco, 431 U.S. 783 at 789-90 interpreting U.S. v Marion 404 U.S. 307 at 324-26

"In addition to the applicable statute of limitations, the due process clause may bar prosecution in some cases of preindictment delay; in order to block a prosecution on the basis of preindictment delay, the defendant must first show actual, non speculative prejudice resulting from the delay."

U.S. v Pallan 571 F2d 497

REASONS FOR THE DELAY INCLUDING BACKGROUND

Chorney alleges that the original strategy was developed by Michael Silverstein of Hinkley, Allen, Comen and Snyder who represented Eastland Bank.

A. Eastland petitions CIC into a State Receivership in order to:

1. put CIC out of business
2. place assets under control of State Receiver, alan Shine
3. initiate state investigation of CIC-a state grand jury is initiated concerning "consumer protection"
4. Postal Inspector and other Federal Agencies are contacted
5. make the court and not Eastland Bank responsible for the "commercial reasonablebess" of liquidation
6. cover up the crimes of Eastland Bank and to weaken Chorney's ability to defend himself

During the state receivership from October 23, 1989 to November 8, 1989 and after CIC was in a federal bankruptcy court, Alan Shine had correspondence adn other communications with Silverstein, State and Federal Agencies. See Shine billings.

Chorney alleges that a state grand jury was initiated, and that no wrong-doing was found and that the work product was given to the U.S. Attorney.

B. Eastland petitions CIC into a Federal BAnkruptcy Court in R.I.

In a depostion of Michael Silverstein on August 7, 1992 he stated:

"My recollection is that we started hearing from other creditors... I may at that point have heard from some law enforcement officials... I had some conversations with the temporary receiver, Mr. Shine, predicated on that,...
State court receivers have less powers than do fiduciaries in the bankruptcy proceeding, I recommended to the bank, and the bank agreed taht we would file an involuntary proceeding....before the bankruptcy court with its far reaching powers...." R. 34, 35

While in the bankruptcy proceeding the following occured:

1. CIC was virtually out of business operating under a TRO not to sell without a court order, and being under the scrutiny and whims of a court appointed Examiner, who had been fronted monies by Eastland Bank.

2. Examiner, Michael Weingarten, was in contact with the Postal Inspector, U.S. Attorney, F.B.I. as well as Michael Silverstein and Peter Furness of Hinkley, Allen. (See Weingarten Billings)

3. A personal attack on the credibility of the defendant, then debtor in possession (in name only) by Eastland Bank and the Examiner.

4. After numerous hearings, Chorney is fired and a Trustee, John Cullen is appointed to run CIC after much publicity and allegations of fraud. Examiner's Report #2 is an **accusation** not an allegation. This report dated 16 April 1990 states:
"..this would support a finding that Cumberland has knowingly defrauded its customers."
This report #2 was under seal and on 19 July 1990 in answer to a FOIA to Postal Department dated 10 May 1990, a copy of examiner's report #2 with CONFIDENTIAL marked on it is given to Chorney in discovery.

C. Silverstein strategy to **assist** federal agencies to pit a criminal case together. The Trustee John F. Cullen, who was fronted money by Eastland Bank, was to investigate CIC and Chorney under the egess of the Bankruptcy Court. Eventually, the Trustee's private detective was hired by the bank directly.

A. Various law enforcement officials met at my office to discuss various aspects of the Cumberland situation at their request.

Q. Various law enforcement officials?

A. It was an agent of the Federal Bureau of Investigation and Postal Inspector.

Q. What did the meeting disclose, the subject matter of the meeting?

A. The agent wanted to meet with counsel to the bank and with counsel to the Trustee, Mr. Bertozzi, to discuss on-going Federal Investigations into the machinations of Mr. Chorney and Cumberland Investment, and you can substitute machinations for the word activity.
August 7, 1992 R. 36, 37

....There was a private investigating firm. Whether or not it was engaged by the bank or the Trustee, I don't know, and it was obviously afther the filing of the bankruptcy.
August 7, 1992 R. 37

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D. After the appointment of the trustee

The indictment for mail fraud was delayed to weaken the accused ability to defend himself. The long delay while the bank, trustee and agencies all worked together, all knowing that Chorney could not communicate with anyone involved gave an obscene tactical advantage to the government.

Chief Justice Berger in Dickey v Florida, 398 U.S. 30 at 46 sated that:

> "Deliberate governmental delay designed to harm the accused, however, constitutes abuse of the criminal process. It lessens the deterent value of any conviction obtained..and it very probably reduces the capacity of the accused to defend himself; unlike the prosecution, he may remain unaware that charges are pending and thus fail to take steps necessary to his defense."

With Cullen and Blais as virtual agents of Eastland Bank, information and leads were developed that were given to Mr. Posner to persue. Material and information that would not be discoverable in any other way was being discovered by Eastland Bank through the grand jury process to be used against Chorney, Wescap and the Redemption Clients in civil suits against Eastland Bank.

Meanwhile the motivation increased to direct the offenses to Chorney personally. In May 1990 Chorney had contacted the PI and FBI through FOIA's. Neither stated that Chorney was the target.

However since Cullen and Weingarten would have recommended the criminal indictment, their testimony would only serve to justify their own actions.

Posner in the interim is more interested in justifying the indictment than his concern with the abusive tactics of Cullen to get information.

The fruits of the criminal complaint are desireable for the U.S. Trustee and that's why he got the job in the first place.

1. it vindicates his position that Chorney removedcin the best interest of estate and to protect the public
2. Trustee gets a percentage of the money discovered or recovered
3. Brownie points and other rewards from Eastland Bank

The Trustee is interested in the money first and the criminal prosecution next. Cullen'feeding information to Posner was predicated on this motivation and facilitated the preindictment delay.

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EXAMPLES OF ABUSE OF PROCESS

1. The most egregious abuse of process was when defendant Chorney was enjoined by Court Order dated 23 August 1990 from contacting former clients. Chorney was ordered to inform any client who contacted him that Chorney was not allowed to talk to them of Cumberland business and to refer said contact to the Trustee.

   In effect the U.S. attorny and agencies were contacting the same potential witnesses in a parallel investigation with the bankruptcy court while I was unable to contact these same potential witnesses.

   In U.S. v Callahan, 371 F2d 658 at 660 it clearly states that witnesses don't belong to either side.

   "Both sides have the right to interview witnesses before trial."

   This enjoinment which lasted until March 1992 gave an unfair tactical advantage to the government.

2. CIC mail was being fowarded by Court Order to the U.S. Trustee. However, some mail addressed to Chorney was being intercepted in violation of title 18 §2515.
   The Court Order referred to CIC mail only, yet personal mail has been intercepted by government some of which is contained in discovery from the U.S. attorney. Other mail from clients that was sent to the defendent personally has not been turned over to defendant..
   The bankruptcy court order of August 1990 after the Hearing on January 8, 1992 was changed on March 1992 so that Chorney could view said mail. However to this very day none of the mail has been viewed since the Trustee claims that that mail is all in the custody of the U.S. Attorney now.

3. The former telephone lines of CIC, Chorney, FPC and Wescap were all fowarded to the offices of Mr. Bertozzi, counsel for the Trustee. A recording was placed on each line which stated:

   "Harold Chorney was forbidden by Court Order to talk about Cumberland business..."

   Clients as well as non-clients of CIC who attempted to call Chorney and heard this recording felt that they were not allowed to talk to Chorney by law.

   The Silverstein strategy touts that court orders contain elements beyond the scope of what the Judge says in bankruptcy court are rarely overturned.

4. Defendant Chorney alleges that his new telephone lines were/are being intercepted in violation of Title 18 §2515. In addition Chorney experiences electronic scrambling noises over his TV at different times of day.

IMPAIRMENT OF ABILITY TO DEFEND ONESELF

So Chorney being precluded from contacting others most definately gave a huge tactical advantage to the government. In addition to not being able to contact his potential witnesses, those potential witnesses who attempted to write or call Chorney would have their mail and calls intercepted and scrutenized by the Trustee, who in turn gave this information to the U.S. Attorney and possibly others.

> "In determining the effect of a preindictment delay, the governing standard whether the delay has impaired the defendants ability to defend himself."
>
> U.S. v Golden 436 F2d 941

1. Because defendant Chorney's mail and telephone calls were intercepted, he was denied the ability to talk to potential witnesses **when they wanted** to talk to him.
   Surely defendant Chorney could contact many of these same people today if he knew who they were. However, he may be contacting these people after they had been contacted by others or may have been influenced not to talk to defendant Chorney.

2. The fact that agencies have told certain potential witness not to talk to defendant Chorney or anyone about their interviews or appearance before the grand jury has impaired Chorney's ability to defend himself.

3. Defendant Chorney feels that the inevitable "coaching of Government witnesses would have been minimized more effectively concerning events of 4 to 7 years ago had he had to ability to converse or cross- examine these witnesses at an earlier stage of the proceeding.

   Similar circumstances of "coaching" of government witnesses is mentioned in U.S. v MacDonald, 456 U.S. 20 at 23

4. Under 18 U.S.C. 3057(b) the U.S. Attorney is required to commence an investigation "without delay" and to present any probable offenses for the grand jury's consideration.

   U.S. v Zimmerman 738 F Supp 407 at 413

   Defendant alleges that when the U.S. Attorney received information from the state grand jury investigation, that the investigation did not officially commence, since Chorney was both gagged and tied.

At a Bankruptcy Court Hearing on October 8, 1992, Seymour Posner, A.U.S.A. stated:

> I would indicate to Your Honor that, from the criminal case point of view, I've been working on this case over a year. I couldn't ge an FBI agent who would stay long enough on the case, initially. When I finally did, we were off and running. It took, from his appearance in the case, a good year to put the case together. We're still investigating. We have not finished. Even though we've brought an indictment, there's some loose ends that we're tying up. We started with a roomful of records and nothing else, and its taken quite a bit of time to put this kind of a case together. White collar, economic crime type cases are not easy, a lot of paper.
> October 8, 1992 R. 10, 11.

It is obvious from the statement above that the government delay was to complete the investigation. Rather Chorney alleges that the motivation for the timing of the indictment was to aid in the influence of the summary judgment against the civil lawsuit against Eastland Bank in order to facilitate the takeover by FDIC and the sale to Fleet National Bank.

5. Witness availability has decreased due to the preindictment delay.

   a. Potential witness William Roszel died. He would have testified that the allegations that Wescap was in no way connected with Western Capital Group of Denver, CO. as alleged in the Manter deposition and elsewhere. Furthermore, Roszel would have testified that he had done a due dilligence on Chorney and CIC before vending CIC product and that CIC's reputation and performance was superior to that of the rest of the industry. That CIC had in the past fulfilled their commitments to the investors who Western Capital had referred.

   b. Witness move. Defendant has tried to contact different people who would testify favorable to the defendant and has received return mail of address unknow or notification of a changed telephone number.

   c. Memory of witnesses fail over time

   d. Exculpatory information like the Tebbetts Agreement which superceeded the tenative agreement referred to in the indictment is lost or misplaced, or in the possession of the government, who is in possession of all of CIC records and other records that were personal, or belonged to Wescap that were removed with CIC records in August 1990.

6. Further delay allowed the government to subject the defendent to adverse publicity for over one and one-half years prior to an indictment during which time defendent was "accused" on several occassions of committing crimes all causing:

   a. Defendent to be subject to the publics scrutiny as stated in Klopfer. Klopfer v North Carolina, 366 U.S. 226

   b. and to cause defendant to live under a cloud of suspicion and anxioty.

   c. loss of reputation in a deliberate smear campaign including such articles entitled: "INVESTORS SAY COIN DEALER FLEEDED THEM", and "EASTLAND ATTORNEY TAKES CACTION AGAINST COIN COMPANY OWNER" where it states that Chorney is going to jail for an unspecified amount of time in relation to criminal contempt. in January 1991.

E531

All the adverse publicity was to make it difficult for defendant Chorney to defend himself and to ruin his credibility so that he could not successfully launch a lawsuit agains Eastland Bank. Furthermore, defendant Chorney claims that the grand jury was biased because of prejudicial pre-indictment publicity as recent as July 15, 1992 entitled, "JUDGE THROWS THE BOOK AT COIN DEALER" where various accusations including criminal for having "wilfully interfered with and obstructed the administration of the case".

7. While the adverse publicity was in progress, the following deprivation of property interests were/are occuring:

   a. Loss of personal property in the bankruptcy proceeding.
   b. Loss of employment and cash flow.
   c. Loss of retirement monies in bankruptcy.
   d. Loss of ability to keep Wescap trading and current on stock exchanges.
   e. Loss of economic ability to fund legal defense.
   f. Loack of money to hire expert witnesses.
   g. Loss of ability to sustain myself, independently.

8. Subpoening records. Preindictment delay allowed the bank to subpoena records under a civil guise to be used to broaden a criminal investigation and to do the same through depositions <u>after</u> meetings with governmetal agencies. In U.S. v La Salle, 98 S.Ct 2357, the court was confronted by the use of IRS administrative subpoenas for the accumulation of evidence to be used in criminal prosecution.

   In the opinion of Justice Blackman, the Court held that although the use of civil investigatory procedures <u>soley</u> for criminal purposes was improper, the agency need only act "in good faith", thus placing upon defendants a "heavy burden" to denstrate otherwise. Id 2367

   In this instant case, the subpoenas were issued to several parties through the bankruptcy court by both Eastland Bank and the U.S. Trustee after extensive meetings between the bank, A.U.S.A., U.S. Trustee, his attorneys, IRS, FBI and Postal Inspector. (Defendant has billings indicating these meetings.)

   This flurry of depositions occured:

   3 Jan 1991 Manter was deposed by Cullen and Furness
   9 Jan 1991 Aubin, of FPC was deposed by Furness
   11 Jan 1991 Chorney was deposed by Furness
   15 Jan 1991 Peter Lockey, CIC accountant was deposed by Furness
   17 Jan 1991 attorney Hershel Smith was deposed by Furness

   These depositions cannot be considered to have been done in good faith.

   How can the deposition of George Manter be considered to have been done in good faithe when:

   a. All sides were not noticed of the deposition
   b. Cull and Blais represented themselves as being members of the Justice Department.
   c. Representations were made that:

      1. Chorney had Roszel killed.
      2. Chorney was with the Mafia
      3. Chorney was involved with money laundering of drug money.

How can the deposition of Hershel Smith, attorney for Wescap, approved by the bankruptcy court although it intefered with the lawyer client relationship be considered a "good faith" act?

Even though "bankruptcy fraud is perhaps the most common ground for parallel federal proceeding because 18 U.S.C. §152 prohibits fraudulent conduct wither in contemplation of or during an actual civil case."
U.S. v Kordel 90 S. Ct 763 at 768
in this present case, neither Chorney nor CIC have been guilty of any 152 violations and furthermore the bankruptcy court directly worked in this parallel action with the A.U.S.A. and in bad faith enjoined Chorney from contacting potential witnesses.

"There are restrictions on the right of Government to overtly, and surely covertly, intrude upon a putative defendant's efforts to prepare a defense during the investigatory stage."
U.S. v Boffa F.R.D. 523, at 524

Defendant Chorney alleges that the summons issued by Eastland Bank and the U.S. Trustee were used in part to gather tax information on Aubin, Lockey, Chorney, Boisvert and others and to develop a conspiracy or other crimes rather than part of a legitimate investigation into bankruptcy matters. Chorney alleges that these depositions were taken in order to harass and pressure potential witnesses like Peter Lockey from testifying on behalf of the defendant.

9. Representations of government to witnesses.

a. Some potential witnesses have been told that they were not allowed to talk with the defendant. William Tebbetts was under this misconception since summer of 1991 when I called him at Worthy Coin and he said to me: "I'm not supposed to talk to you."

George Manter during a depostion by Cullen was told that he could not contact defendant Chorney.

b. Some potential witnesses are receiving threatening statements:

1. Postal Inspector and FBI said that they were out to get her in a post indictment interview witn Rose Erickson.

2. John Truslow of the FBI has made representations to Peter Lockey that Lockey was going to have problems with the IRS if he was bit cooperative. Mr. Lockey made this statement in a confrence call with attorney Bill Waller from Denver and Chorney.

c. There have been a myriad of different governmental representations concerning the character and actions of defendant Chorney by John Cullen, Trustee and Lee Blais and others from LCF, his investigative firm which are the subject of a civil slander suit filed in Superior Court in Providence on Sept 25, 1992, case #92-5642.

All of these representations of government have a cumulative and a direct effect upon the defendant to defend himself.

10. Denial of Criminal Counsel at all "critical stages of the criminal proceedings." as described in U.S. v Wade 388 U.S. 218 at 224 was denied to defendant Chorney. He should have been given a court appointed attorney at a much earlier stage:

> "since Sixth Amendment guarantee does not attach until adversary judicial proceedings have been initiated; properly characterized argument was a challange on the due process grounds to legitimacy of prosecutorial delay in seeking an indictment."
> U.S. v Caiampaglia 628 F2d 632 at 633

Like Caiamaglia, Chorney's right to due process have prejudiced him during the preindictment delay.

Chorney alleges that both the Trustee and his attorney, who were at a 17 January 1991 bankruptcy court hearing, and Mr. Posner and all the players from the bankruptcy court were all aware that Chorney was involved in a de facto "criminal" bankruptcy proceeding.

On 16 January 1991, Peter Furness gives and interview to the Woonsocket Call saying that Chorney was going to jail.

On 17 Jan 1991 there is a hearing in Bankruptcy Court at which time Furness withdraws the motion for criminal contempt saying:

"..I think there's some at least some dicta if not some law, Your Honor, that says probable a prosecutor should bring the criminal motion, so I withdraw that.

THE COURT: "Okay, you can prepare an Order on that. (See 17 Jan 1991 Transcript at 17-18)

11. Denial of Mail

On 20 August 1990 the Trustee obtains a Court Order to redirect corporate mail. Some of the mail redirected is personal mail. In April 1991 and Oct 1991 Chorney files complaints with the Postal Department concerning his personal mail. On 8 Jan 1992 a hearing in Bankruptcy Court is held concerning the mail. One of the rulings in a 3 March 1992 court order was to give me my personal mail. Since that hearing Chorney has not seen any mail from the Trustee. At the 8 Jan 1992 Hearing Denise Gallo, employee of the Trustee says in her affadavit that there is no personal mail taken by the Trustee. At this hearing there was no mention by either Mr. Posner or Cullen or bertozzi that the mail was with Posner. Some personal mail has shown up in the discovery from the U.S. Attorney.

Certainly defendant Chorney is prejudiced by not receiving mail addressed to him from potential witnesses. Some of the correspondence is more than likely favorable or exculpatory.

12. Enjoinment from contacting clients

The most prejudicial preindictment act of government was the enjoinment of Chorney from contacting potential witnesses by court order dated 23 August 1990.

"When judges appear to become 'accomplices in the willful disobedience of a Constitution they are sworn to uphold' Elkins v U.S. supra 223, we imperil the very foundation of our people's trust in the Government on which democracy rests."

U.S. v Calandra 414 U.S. 338 at 360

At a Bankruptcy hearing on 8 January 1992 the following testimony occured.

THE COURT: Why do you have to talk to customers, Mr. Chorney?
CHORNEY: Basic--
THE COURT: Because if I had my druthers, I'd rather not have you in touch with them.
CHORNEY: Basically, Your Honor, I'm being accused of various things and I'm not being given the opportunity to defend myself. R.23

In effect Chorney had been enjoined from defending himself by contacting potential witnesses from August 23, 1990 until 5 March 1992 when the Bankruptcy Court Order was modified.

There is no doubt that Mr. Posner, who drew up the court order continued to contact these very same people from when he was notified of this hearing in November 1991 until March 1992 when the modified court order was filed which gave the government an obscene tactical advantage over the defendant.

Although it may be true that:

"Prosecution has wide discretion in deciding to delay securing of an indictment in order to gather additional evidence, which discretion is limited by the requirement that it not violate those fundamental conceptions of justice which lie in the base of our civil and political institutions."

U.S. v Caiampaglia (1st Cir) 628 F2d 632 at 634 on U.S. v Lavasco, 431 U.S. 783 at 790

Chorney contends that he is dealing with government that is runaway and acts as if there are no limitations or accountability for their actions.

THE COURT: Okay. Before we leave this, if you decide, for whatever reasons, that ther's no more U.S. Attorney or grand jury involvement and we're back to strictly civil, let me know, because then we'll go back to civil--
Mr. POSNER: Understood.
THE COURT: attitudes, okay?
Mr. POSNER: Understood. Thank you.
8 January 1992 R.26

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13. Telephone Message that Chorney was forbidden to talk (to anyone) about Cumberland Business

This telephone message was placed on all telephone lines at 141 Main Street, Woonsocket, R.I. which was the home office of Cumberland Investment Corporation. There were a local and an 800 line at this location. In addition there were Wescap lines that were used for local and 800 purpòses. There was one line that was used as a personal line by defendant Chorney and another local and 800 line for FPC, another company in the same building. All these lines ran through a central switchboard. As of September 1990 all these lines were fowarded to Ed Bertozzi's office with a recorded message that Harold Chorney was forbidden to talk about Cumberland Busoness.

This message was heard by former clients as well as others, some of whom were potential witnesses who felt that they could not speak to defendant Chorney. There can be no doubt that this message and the fowarding of these calls without any number available where Chorney could be reached prejudiced defendant Chorney in having contact with at least non-clients of Cumberland, such as former employees and vendors and others.

14. Agent instructions to people they interview

There seems to be an agreement between the agencies of government- the U.S. Trustee, U.S. Attorney, FBI and Postal Inspector to tell all potential witnesses not to talk to anyone, or not to talk to the defendant Chorney.. These actions would certainly impair Chorney's ability to defend himself.

15. Illegal search & seizure of 15 August 1990

This search and seizure resulted in the Trustee and Lee Blais removing Wescap and personal records which denied Chorney the ability to contact certain clients until he received a list of names and addresses from the discovery from the U.S. Attorney who apparently was given all these records by the Trustee. Had Chorney relized that there was to be a seizure of records rather than an orderly transition, Chorney would have made copy of certain records for his own benefit.

16. Attorney records with the AUSA

In the discovery from the AUSA, defendant discovered a huge amount of attorney/client records from attorney Evans Carter in Boston who was corporate attorney for Cumberland and Wescap. Since no explanation from Mr. Carter as to how the government obtained these records was given to defendant Chorney, Chorney feels that he has been prejudiced by the possible violation of the attorney client privelege without proper or any notification from Mr. Carter. Chorney feels that information given to Mr. Carter concerning the Eastland Bank civil lawsuit strategy has fallen into the hands of the AUSA and shared by the AUSA with others including Michael Silverstein of Hinkley, Allen representing Eastland Bank. Since the record will show that private meetings between Mr. Posner and Mr. Silverstein did occur, Chorney feels prejudiced by the unauthorized exchange of information.

E 536

17. Non-return of records

Chorney feel that he was prejudiced by not having access to records of George Manter that were taken by the Trustee. Manter gave Cullen his only copy of documents relating to loans and other matters, some that were not related to CIC. Manter was supposed to get copy of these records. Two years have gone by after a demand was made for copy. To this day Manter does not have copy of those records.

Peter Lockey gave boxes of records to Mr. Posner. He was supposed to get them back. To this day he has not received copy. Chorney feels prejudiced by the fact that he does not know what records the government may not produce that was exculpatory. Some of the records are personal and do not belong in the possession of anyone other than Chorney or Lockey.

Dismissal based upon preindictment delay

"In order to obtain dismissal of an indictment because of the delay in bringing it violated right of defendant to due process of law, defendant must allege and demonstrate actual prejudice to his defense caused by the delay.

U.S. v White, 470 F2d 170

Chorney has demonstrated and alleged in 1-17 prejudice caused by the pre-indictment delay to justify the dismissal.

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DISMISSAL OF INDICTMENT FOR PREINDICTMENT DELAY

"Whenever a prosecutor using that discretion decides to delay in asking for an indictment, an obvious and foreseeable result is the forestalling of a myriad of procedural safeguards intended for the protection of the indictees"

U.S. v Marion, 404 U.S. 307 at 324

In this instant case, it has been shown that the prosecutor's decision to delay was motivated to impair the ability of the defendant to mount an effective defense and would constitute a due process violation as in Marion.

Compelling defendant Chorney to stand trial after the Government deliberately delayed indictment to investigate further, while enjoining defendant from contacting potential witnesses violates those "fundamental conception of justice which lie at the base of our civil and political institutions" as stated in Mooney v Holahan, 294 U.S. 103 at 112, and "which define the community's sense of fair play and decency", as stated in Rochin v California.

The affects of Marion occured prior to the formal accusation in a deliberate publicity campaign.

> "A formal accusation may interfere with the defendant's liberty, ...disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxioty, in him, his family and friends."
>
> 404 U.S. 307 at 320

> "The unreasonable pre-accusation delay causing prejudice to the defendant's ability to present his defense may call for dismissal of the indictment on due process grounds.
>
> U.S. v Burkett, 530 F2d 189 at 196

Chorney holds that because of the Trustee's "culpable negligence" in failing to inform the AUSA of the decision to enjoin Chorney from contacting clients more than 2 years prior to the indictment while supplying information to the AUSA and other agencies was **unreasonable** and a denial of Chorney's right to due process.

The purpose of the due process clause of the fifth amendment is to assure a defendant in a criminal case a fair trial when prosecuted on a charge of crime.

....before a defendant is entitled to have an indictment against him dismissed for delay, whether pre-prosecution or post prosecution, he must establish 1. actual prejudice to his defense resulting from the delay, 2. that the delay was unreasonable, 3. unreasonable depends not only upon the length of the delay but also upon other factors including the reasons for it.

U.S. v Burkett, 530 F2d 189 at 198

In this instant case defendant has demonstrated both bad faith and improper motives of government.

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"The dismissal of an indictment because of deliberate governmental misconduct is used as a prophylactic tool for discouraging future actions of the same nature."

Elkins v U.S. 364 U.S. 206 at 217 as quoted in
U.S. v Houghton, 554 F2d 1219 (1st Cir)

"The nature of the conduct must be such to convince the court of the need for a deterrent against similiar governmental conduct in future investigations and prosecutions."

U.S. v Belculfine, 508 F2d 58 at 61 (1st Cir)

The prosecutor, Mr. Posner claims to have no knowledge of the enjoinment prior to November 1991 when defendant Chorney requested a hearing in bankruptcy court. Mr. Posner showed a reckless disregard for the circumstances still contacting clients and others fully knowing that Chorney did not have the ability to mount an effective defense during this period of time between November 1991 and March 1992.

"Rather than deviating from elementary standards of 'fair play and decency', a prosecutor abides by them and refuses to seek indictments until he is completely satisfied that he should prosecute and will be able properly to establish guilt beyond a reasonable doubt."

Smith v U.S., 360 U.S. 1 at 10 as quoted in
U.S. v Marion, 404 U.S. at 324

However in this instant case it appears that the Government's delay was to weaken the defendant rather than the governments efforts to identify persons in addition to Chorney who may have participated in offenses. The fact that the investigation is on going does not mean, like in U.S. v MacKonald, 456 U.S. 20 at 22 that the Government has not demonstated that it could not have pursued those leads earlier.

"Deliberate attempt to delay trial in order to hamper defense should be weighed heavily against Government."

U.S. v Burkett 530 F2d 180 at 195 quoting
Barker v Wingo 407 U.S., 514 at 531

Defendant Chorney alleges a more sinister motive for the delay, and that being to "hold a club" over the defendant and his ability to support a civil suit against Eastland Bank and the U.S. Trustee, while the Bank was building a case to find a "fall guy" for their illicit deeds.

In a similiar manner to the prosecutor in Giglio, the prosecutor cannot be insulated from the rest of the prosecution team.

Giglio v U.S. 405 U.S. 150 at 154

Those elements of actual prejudice, Marion, 404 U.S. at 325, 326 and reasons for the delay, U.S. v Lovasco, 431 U.S. 783 at 791-5, that were lacking in United States v Cerrito, 612 F2d 588 at 593 are all present in this instant case.

" A process of balancing the reasonableness of the delay against the resulting prejudice to the defendant" was developed in

U.S. v Jackson, 504 F2d 337 at 339

"The test for determining prejudicial impact is whether the delay 'has impaired the defendant's ability to defend himself'".

Golden v U.S. 436 F2d 941 at 943

and the trial court's finding on the prejudice issue must stand unless clearly erroneous.

U.S. v Burkett at 193 interpretation of
U.S. v Jackson, supra at 341

E540

II. EQUAL PROTECTION UNDER THE LAW

"Fifth Amendment prohibits the Federal Government from taking any action which would deny to any person within its jurisdiction the equal protection of the law."

U.S. v Falk, 479 F2d 616 at 617

Defendant Chorney was not afforded the basic right to defend himself in violation of his due process rights and consequently was denied equal protection of the law.

III. SELECTIVE PROSECUTION

"An enforcement procedure that focuses upon the vocal offender is inherently suspect, since it is vulnerable to charge that those chosen for prosecution are being punished for their expression of ideas, a constitutionally protected right."

U.S. v Steel 461 F2d 1148 at 1149

(See section on First Amendment abuses)

FOURTH AMENDMENT ARGUMENTS

"The right of the people to be secure in their persons, houses, papers, and effects, against unreaonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U.S. Constitution, Amendment IV

"The exclusionary rule extends to all evidence that is the fruit of an illegal search or arrest."

Wong Sun v U.S. 371 U.S. 471 (1963)
Silverthorne Lumber Co. v U.S. 251 U.S. 385 (1920)

When a defendant establishes that evidence was obtained as a result of unlawful government conduct, the burden is on the government to establish an independent basis for the evidence by a preponderance or to show that the evidence has been purged of its original taint.

U.S. v Matlock 415 U.S. 164 (1974)
Wong Sun v U.S. 371 U.S. 471 at 488

"The [exclusionary] rule is calculated to prevent, not to repair. Its purpose is to deter-to compel respect for the constitutional guaranty is the only effective available way-by removing the incentive to disregard it."

Elkins v U.S. 364 U.S. 206 at 217

BACKGROUND OF THE SEARCH AND SEIZURES

The illegal search and seizures fall into different categories:

A. The August 15, 1990 search and seizure
B. August 17, 1990 so called rescue mission
C. The Manter deposition on 3 Jan 1991

D. Personal Mail of Harold F. Chorney

A. The August 15, 1990 Search and Seizure

After hearing in bankruptcy court on July 25, 26 and 30 of 1990, a court order dated August 9, 1990 results in the appointment of a Chapter 11 Trustee to be named at a latter date.

On August 15, 1990 the U.S. Trustee, Virginia A. Greiman sends a letter to James Lynch, Clerk of the Bankruptcy Court stating:

"Under the Code, this appointment is subject to the approval of the Court."

E 542

referring to the appointment of John Cullen as Chapter 11, Trustee. On August 17, 1990 the appointment is approved by Judge Votolato. A bond for $2,000,000 without surety is entered in the docket (#145) on August 23, 1990.

On August 15, 1990 John F. Cullen comes to 141 Main Street and was logged in at 7:52 P.M. by the guard on duty, Luis Bello. Cullen represents himself to Chorney as being with the Justice Department. He was accompanied by Lee Blais who was holding a video camera (Blais did not sign in) as well as John Dougherty, Vice President of Eastland Bank.

Mr. Cullen over my objection starts to take personal papers and Wescap materials from my office, which was a CIC office, and elsewhere. While this is occuring Mr. Blais is taking a video of the proceedure. Mr. Cullen after a half hour or so says, "Don't think that I did not read you your Miranda Rights?" and states something about a Bankruptcy Code in the 4000ths.

When they left at 10:00 P.M. I asked them for a list of what they were taking and received no response. Cullen had billed the estate for five hours for this two hour stay.

> "On August 15, 1990, the Debtor, after nearly five and a half hours of conversation with the Trustee, steadfastly refused to remove himself from the basement of the building."
>
> "The Trustee had received specific instructions to enforce this Court's Order discharging all employees and to ensure that the Debtor was removed from the Premises."
>
> Affidavit of Trustee, John Cullen signed August 16, 1990

On August 24 and September 23, 1990 attorney David Cicilline sends letters to Cullen concerning the search and seizure and receives no response.

B. On August 17, 1990 there is a hearing in Bankruptcy Court concerning the Trustee's motion to physically remove the debtor from the premises at 141 Main Street, Woonsocket, R.I. When defendant's attorney John Oster calls the Trustee to the witness stand, the Judge grants a continuance. That very evening, the assets and paperwork of Cumberland Investment Corporation are removed from 141 Main Street in what was described in the newspaper as a "rescue mission".

During the removal of documents and assets from the Cumberland offices, the Wescap Office, which was clearly marked with a sign on the door, was entered and documents were removed. In addition an office on the second floor with the name of FPC on the door was entered and documents were removed. CIC documents were planted on Mr. Aubin's desk and stacks of thousand dollar money wrappers were planted in the basement vault. Other offices on the second floor were entered. The door to the stamp room, which the locks to that door were changed by Eastland Bank's locksmith and the keys given to the guards from Professional Security Services, was smashed in-glass broken and door bent.

During this entire operation on August 17, 1990 while the breaking and entering was occuring, no CIC personnel were on the premesis.

On August 20, 1990 the continued hearing from August 17, 1992 takes place. As a result of the "problem no longer existing" John Cullen withdraws the Motion to Physically Remove the Debtor from the Premesis.

E543

Defendant alleges that the antics of the Trustee between August 15 and August 20 were done to seratipiciously gain discovery, and to cover up their illegal acts which include:

Coersion and threats of being physically evicted from property that the Trustee and bankruptcy court had no jusistiction over.
Breaking and entering.
Illegal Search and Seizure

C. At the Manter deposition on January 3, 1991, John Cullen, Trustee represents himself as being a member of the Justice Department. He is accompanied by Lee Blais and Peter Furness, attorney for Eastland Bank. Mr. Manter is coerced into giving them his records. Cullen assures him that he will get copy. Mr. Manter writes a demand letter to get copy after several months had gone by. Mr. Manter received no response.

D. On August 20, 1990 a bankruptcy court order is entered to foward the CIC mail to the Trustee and the Trustee and Gerald Aubin were to review all FPC

mail together. According to the order:

"2. That all personal mail of Harold and Lou Chorney and Gerald Aubin are not affected by this order."

The record will show that Mr. Aubin did not meet once to review any mail with the Trustee and that <u>personal</u> mail of Harold Chorney was taken by the Trustee.

On January 17, 1991, Lee Blais from LCF, investigators for the Trustee refer to several hundred letters of individuals who have lost their money with CIC. Defendant has a tape of Lee Blais and Robert Carey from LCF and Joanne Kitchens from Denver, Colorado concerning this conversation.

On October 8, 1991 defendant files a complaint with the U.S. Postal Service because he is not receiving all of his personal mail. (K4 704 977)

On January 8, 1992 there is a court hearing concerning defendant's mail. Mail addressed to defendant was not getting to him. In fact the Trustee signed for a certified letter addressed to the defendant that resulted in a Default Judgement, which defendant latter had vacated due to lack of notice.

On March 3, 1992 there is a court order for Chorney to get certain mail. Mr. Posner, A.U.S.A. was made a party to both this order concerning the mail, but also to the court order involved with defendant being enjoined from contacting clients. Defendant Chorney never got any mail after writing twice to Mr. Bertozzi, attorney for the Trustee, John Cullen. In a conversation between Z. Hershel Smith and John Cullen, as related by Smith to defendant, the mail that defendant wanted to review was with the A.U.S.A.

The following will indicate a knowing and wilfull conspiracy to deny defendant Chorney his constitutional rights.

MR. BERTOZZI: Your Honor, Mr. Cullen is here and can explain his arrangements for the mail, and the--also there's an affidavit I want to present from--well, through Mr. Cullen from one of his--his paralegal who handled the mail to explain how the mail has been handled, and that in fact Mr. Cullen does not have any personal mail. And we object to Mr. Chorney being able to review

all the mail that has come into Cumberland and the Trustee, and the reason is that the company is not operating, Mr. Chorney has no legitimate reason to want to see that mail, and what he really--the real reason why he wants to see it is that he knows he's under criminal investigation and he wants to see what's in there that the government might have. And Mr. Posner is here from the U.S. Attorney's office to speak to that, also.

Transcript of Bankruptcy Court Hearing on January 8, 1992 R. 4

The Affidavit of Denise Gallo, paralegal to the Trustee indicates that there was no personal mail. Discovery from the A.U.S.A. indicates otherwise.

"4. There has been no mail personally addressed to Harold Chorney that did not pertain the business of Cumberland Coin that I recall."

Her affidavit was signed on December 10, 1991.

E545

"A seizure of property occurs when there is some meaningful interference with an individual's possessory interests in that property."

U.S. v Jackson, 466 U.S. 109 at 113 (1984)

"In the ordinary case, the Court has viewed a seizure of personal property as per se unreasonable within the meaning of the Fourth Amendment unless it is accompalished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized."

U.S. v Place, 462 U.S. 696 at 701 (1983)

"A warrantless search is per se unreasonable unless the government can demonstrate that it falls within one of a carefully defined set of exceptions to the Fourth Amendment's warrant requirements."

U.S. v Munez-Guerra, 788 F2d 295 (1986)

The fourth amendment prohibition against unreasonable searches protects against warrantless intrusions during civil as well as criminal investigations. The reason is found in the 'basic purpose of this Amendment which is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials'.

"If the government intrudes on a person's property, the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards."

Franks v Smith, 717 F 2d 183 at 186 (1983)

In Mancusi, Warden v DeForte, 392 U.S. 364 (1968), records were seized from an office shared with others while the subpoena was for other offices in the same building. DeForte was present in that other office and had custody of the papers at the time of seizure and protested their seizure. The seized material were admitted at his trial for conspiracy and other charges and he was convicted. The Federal District Court denied a writ of habeas corpus, but the Court of Appeals reversed and directed that the writ issue on the ground that De Forte's Fourth and Fourteenth Amendment rights were violated by the search and seizure and that the materials were inadmissable under Mapp v Ohio, 367 U.S. 643.

In this instant case, there was no subpoena duces tecum. Like DeForte, Chorney was present and objected to the search and seizure of documents from the Wescap office and personal papers from Cumberland Investment Corporation's office.

Under the rule laid down in Linkletter v Walker, 381 U.S. 618, Chorney is entitled to invoke the exclusionary principal established in Mapp. See 381 U.S. at 622 and n.5

"right of the people to be secure in their...houses..." This court has held that the word "houses" as it appears in the Amendment, is not to be taken literally, and that the protection of the Amendment may extend to commercial premesis."

Mancusi v DeForte at 367

E 546

"anyone legitimately on premises where a search occurs may challange its legality....when its fruits are proposed to be used against him."

Jones v U.S. 362 U.S. 257 at 267

There was little doubt in the defendant's mind that the Trustee was conducting a criminal investigation, reading Miranda warnings and stating Justice Department Codes and Punishments when he objected to the Trustee taking personal and Wescap documents.

"It has long been settled that one has standing to object to a search of his office as well as his home."

Mancusi v DeForte at 369

Like DeForte, who was granted standing, Chorney was not the owner of the searched premesis. The search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant."

Mancusi v DeForte at 370

In Silverthorne Lumber Co v U.S., 251 U.S. 385, a corporate office was searched for papers which the corporation had refused to deliver in response to a N.Y. District Attorney subpoena similiar to the one in DeForte.

However, Chorney had not refused to deliver documents in response to any subpoena of the bankruptcy court, or any other court.

In Silverthorne, the seizure of the papers was unjustified and characterized as "an outrage" by Justice Holmes.

Silverthorne v U.S. at 391

In this instant case, the seizure is also **outrageous**.

"In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else."

Jones v U.S., 362 U.S. 257 at 261

Considering the evidence, and the indictment, Chorney was singled out as a target prior to the search and seizure. The search and seizure of 141 Main Street was not involved with technical illigalities or by inadvertent violation, but were a blatant disregard of the Fourth Amendment rights of the defendant.

Like Baskes, Chorney asserts that much of the government's evidence, and perhaps the indictment itself, was derived from allegedly illegal investigative activity.

See U.S. V Baskes, 433 F Supp 799 at 801 (1977)

E547

Justice Fortas in Alderman v U.S., 394 U.S. 165 at 207-9 states:

> "one against whom the search was directed is a victim of an invasion of privacy entitled to assert the exclusionary ruel."
>
> "The judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence."
>
> McNabb v U.S., 318 U.S. 332 at 340

Since McNabb, the supervisory power has been utilized to suppress evidence, and even to dismiss entire prosecutions where governmental bad faith conduct caused "the waters of justice [to be] polluted."

U.S. v Banks, 383 F. Supp 389 at 397 (1974)

In U.S. v McCord, 509 F2f 334 at 339 (1974) the Court stated:

> "...serious prosecutorial misconduct may so pollute a criminal prosecution as to require dismissal of the indictment or a new trial, without regard to prejudice to the accused."

In Baskes, supervisory powers are described as a "harsh ultimate sanction" that are more often referred to than invoked and are apparently kept in reserve for

> "conduct that shocks the conscience."
>
> Rochin v California, 342 U.S. 165 at 172 as stated in U.S. v Baskes, 433 F Supp 799 at 806 (1977)

Defendant Chorney alleges that the government agents in this case knowingly removed personal property and Wescap property. That they knowingly broke into the office of FPC and removed documents from the Wescap office and that these same records were then turned over to the U.S. Attorney.

Defendant Chorney alleges that the government knowingly and deliberately condoned the illegal investigative methods of the U.S. Trustee by the issuance of court orders which enjoined defendant from contacting witnesses and others concerning the illegal search and seizures and other activities. The enjoinment occured on August 23, 1990 right after the illegal search and seizures.

Defendant Chorney alleges that once he was gagged by the enjoinment order so that these illegal investigatory techniques would not come to light and that the defendant would not be able to contact witnesses and others concerning what was happening.

Some of the illegal investigatory techinques included the illegal search and seizure of his personal mail as evidenced by discovery from the U.S. Attorney. Defendant also alleges that other mail and telephone calls were intercepted an that:

> "Any of defendant's statements that were the fruits of any evidence wrongfully seized and not just statements "with reference to", "with respect to", or "regarding" the items that were suppressed were inadmissible."
>
> U.S.C.A. Const. Amendment IV as state in U.S. v Basurto, 497 F2d 781 at 783 (1974)

E548

"Any statements made by the defendant that related to or were prompted by any inadmissible evidence, or that would not have been made but for the possession of such evidence by the government agents, were the "fruits" of, or derived from, such evidence and were not admissible."

U.S.C.A. Donst. Amend. 4 as stated in Basurto at 783

need to expand on

A) Electronic surveillance

B) Interception of mail

C) Search + Seizure of mail

by the prosecution team.

* Another Search + Seizure done after conviction sometime between Sept 93 + Sept 96 to be explained

E549

EXHIBIT D

CHRONOLOGY OF AUGUST 15

1. Mr. Cullen, Mr. Doherety and Mr. Blais arrive together at 7:52 P.M.

2. I heard the door beep as they entered the main area of CIC.

3. Mr. Blais was holding a video camera on me while Mr. Cullen was telling me that I had to leave the premesis. "The Judge wants you out of here." "if you do not leave the federal marshals will take you out in handcuffs." "Don't you remember the Judge saying that to you?" I answered, "No." "Did Mr. Ciciline or Mr. Greenberg tell you this?" I answered "Yes, but that was on 27 July during their emergency telephone call with the Judge when he granted the motion for armed guards. He (Judge) never told me.

4. When I was told to leave my apartment, I did tell them (See #9) "that I had no place to live and no one had ever told me I had to leave, including the court.

5. I asked Mr. Cullen to show me the court order in writing--he did not. I was now seated and the video camera was pointed at me. I sat down in the chair and my chest started to tighten up. Mr. Blais was still pointing the camera at me so I got up and walked around.

6. Mr. Cullen once again threatened me with the US Martials bodily removing me from the premesis. He said, "Why don't you give this man looking at Mr. Doherety, the 2 Million that you owe him?"

7. Cullen then said, "Why don't I confess." "That some people do 3-5 years and others 5-10 years and some ...different prison terms (I don't recall his actual words. "But" he said you are the first person in a case like this to ever be there when he got there and that was a plus."I asked him if he were involved with other coin cases and he gave me examples of people who left town in the middle of the night type examples.

8. Blais then asked me if I had a gun. I said, "No". "Don't you have a gun, knives or some other weapon?" I told him I lived here and had knives to cut bread and just like any household would have knives. I asked Blais where he was from? He said he lived in Lincoln but he had offices in Houston. I did not know if Blais was armed. Doherety was standing around and glouting during the questioning and brow beating. When I asked Mr. Cullen about Blais, Cullen said, "He is the guy who does all the investigating for me."

9. Mr. Cullen came into my office with me while Mr. Blais and Mr. Doherety were outside.

10. Mr. Cullen started to look through my credenza, taking check books out and asking questions about checking accounts. He asked if there were any Cumberland accounts outside the U.S.?.

11. Blais asked if Wescap had any accounts outside the U.S. I answered, "Yes, It was a Canadian Corporation and had an account in Canada. Blais asked, "What bank and how much was in it. I answered, "Around $6,000." Mr. Blais also said that they were seeking to obtain links in th chain of evidence. He asked me for Wescap's transfer agent. I told lhim that it was Montreal Trust.

E 550

12. Mr. Cullen was pulling out papers from my desk. I told him that some of the papers were personal. He told me that he could do what he wanted to do and then he stated some bankruptcy code in the 1100ths. After ½ hour or so he said don't think I did not read you your Miranda Warning, because here it is...he did not read it at all. He took safety deposit box keys including our personal safety deposit keys.

13. Cullen then continued to talk of confessing and going to prison. He stated that one person he sent to prison was overweight and that prison did him a lot of good because he was in good shape when he got out after serving 5 years or so.

14. Cullen was taking papers that were not Cumberland records. I told him that "I object". He said that "You can object all you want but he could do whatever he wanted to do.

15. Cullen proceeded to take personal, Wescap and ADI paperwork.

16. Cullen pulled out my cardiac folder. He asked me if I were a cardiac patient. I answered, "Yes". He then brought up going away for 5-10 years again. He said, "You seem to be a nice guy, why didn't you sell your coins to pay these people?" I indicated that I was attempting to do just that in a commercially reasonable manner, but that the bank had interfered with that process.

17. Cullen then gave the documents and other paperwork to Blais who asked me questions about a Panamanian Bond Issue.

18. The Osbourne folder was taken. I was asked about the Ral Group, the underwriters of the bond , who are located in Curacau.

19. It appeared as is Blais had already done some research on CIC and Wescap.

20. Cullen handed papers to Blais. Blais boxed them. "Do you see this one", said Cullen talking about a flyer that was sent in Florida by the Portfolio Group.

21. They took the master filing of Wescap. Blais asked about Wesmont Corp.

22. Cullen was talking of photocopying everything.

23. I asked for an inventory of what they were taking. They would not supply any.

24. We (all 4 of us) went downstairs. I showed Cullen how the downstairs door to my apartment could be sealed from the outside so I could not have any access to the CIC space.

25. Cullen starred into my apartment. He did not enter.

26. Cullen asked me who the pretty lady was. I asked which one, my fiancee, my daughter or my mother. He said the one in the big picture on the wall.

27. I said that was my fiancee from Texas.

E 557

28. Blais said they sure grow them nice down there.

29. We went up the back staircase, the way we came down and went back to the CIC area.

30. Cullen and I went back into my office. Cullen asked if there were any hidden places or secret hiding places. I said I knew of none.

31. I do not know where Doherety or Blais were searching while I was with Mr. Cullen.

32. I do not know all the papers that they took. It wasn't till after they left that I noticed my gold Cross pen and a picture of Patsy and me were missing from my desk top drawer. There may be other items missing, I just don't know.

33. Cullen took a special agent's handbook on the IRS from my credenza and some other paperwork.

34. Cullen made statements like I knew he was coming and I cleaned everything out.

35. Around 10 PM Blais left with Doherety and Cullen said he would be back with a Court Order.

36. It wasn't until Thursday 16 August that I discovered Luis Bello the guard on duty kept a log of who went in and out.

37. A little after 10 PM I joined Lou Chorney and George Manter at Chello's Resteraunt.

38. Around 10:30 Lou, George and myself returned to my apartment at 141 Main Street.

Page 4 of the transcript of 16 August 1990 clearly shows that Mr. Cullen was ordering me out of my living quarters with no court order.

See next page with testimony of the Judge (Votolato).

E552

EXHIBIT D

UNITED STATES BANKRUPTCY COURT

FOR THE

DISTRICT OF RHODE ISLAND

Met Debtor / No access

During recess trip was locked

In Re:

CUMBERLAND INVESTMENT CORPORATION — Case No. 89-11051
Chapter

Debtor

TRUSTEE'S EMERGENCY MOTION FOR A HEARING TO PHYSICALLY REMOVE THE DEBTOR FROM THE PREMISES

Now comes John F. Cullen, the duly acting and qualified Chapter 11 trustee ("Trustee") of the above captioned matter and respectfully represents as follows:

1. On August 15, 1990, the United States Trustee's Office appointed John F. Cullen the Chapter 11 Trustee.

2. After a briefing from the United States Trustee's Office concerning the nature and complexities of the case, the Chapter 11 Trustee made arrangements with Eastland Bank to gain access to the premises at 141 Main Street, Woonsocket, Rhode Island ("Premises").

3. The Trustee met John Doherty, Executive Vice President of the Eastland Bank, at the Premises at 7:30 p.m. on August 15, 1990. Entry was made onto the Premises without incident.

4. The Trustee met with, Harold Chorney, the debtor in the above captioned matter ("Debtor") and inspected the Premises with him.

E553

5. On August 15, 1990, the Debtor, after nearly five and a half hours of conversation with the Trustee, steadfastly refused to remove himself from the basement of the building.

6. The Trustee had received specific instructions to enforce this Court's Order discharging all employees and to ensure that the Debtor was removed from the Premises.

7. This Court has had numerous dealings with the Debtor during the Chapter 11 proceeding so the Trustee will not take time restating facts that this Court is familiar with.

8. The Trustee informed the Debtor that if he did not leave voluntarily, a Court Order would be sought to cause his physical removal by the United States Marshall Service and local police.

9. The Debtor, on August 15, 1990, at 10:58 p.m., again declined to remove himself from the Premises because, in his words, "he had no place to live and no one had ever told him he had to leave, including the Court".

THEREFORE, the Trustee respectfully requests that this Honorable Court grant an emergency hearing to consider the following requests:

1. An order that the Debtor and his personnel property be physically removed from the Premises located at 141 Main Street, Woonsocket, Rhode Island.

2. An order that the Trustee, his agents, employees, attorneys and others similarly engaged to be permitted to enter the Premises to change the locks as necessary and to arrange for the removal of all personnel items including clothing of the Debtor and store them in a warehouse, if necessary, to effectuate this order.

3. An order that the United States Marshall Service, the Rhode Island State Police and local law enforcement

officials shall be used by the Trustee to remove the Debtor physically from the Premises at 141 Main Street, Woonsocket, Rhode Island, forthwith.

4. An order that the Debtor, Lou Chorney and Gerald Aubin have no access to the Premises located at 141 Main Street, Woonsocket, Rhode Island or their agents or appointees including counsel.

Respectfully submitted,
CUMBERLAND INVESTMENT CORPORATION

By its Trustee,

John F. Cullen

John F. Cullen, Esquire
CULLEN & RESNICK
Charlestown Navy Yard
Shipway Place, C-3 & C-7
Boston, Massachusetts 02129
(617) 242-4860 (bma01750)

Dated: 8/14/98

E555

Chorney, I don't believe was on the line, but Mr. Boyajian's office was and also Mr. Cicilline was present representing Mr. Chorney personally, and the subject of the occupancy as a residence of that space came up, and the Court made it perfectly clear that -- to both -- well, to everybody who was on the line, and I assume that Mr. Cicilline and Mr. Mo Greenberg from Boyajian's office, were told that Mr. Chorney's living there was not a satisfactory arrangement on a permanent basis, that he should have at that time start looking for new living quarters, and that I was warning him at that time on the 27th of July to give him lead time. Now I know he's here this morning saying he, you know, has never been given any information by the Court that -- that he was told to leave and it's true. There was no order at that time, but we talked about lead time. I think I stated -- I'm going from my law clerk's notes now. This is not a recorded hearing that I'm telling you about, but at the most Mr. Chorney was a guest on the premises and that he had no privacy right to be there. I think that Mr. Cicilline was raising privacy issues regarding Mr. Chorney's presence, and, in fact, he was raising privacy issues that the bank or other interested parties shouldn't be allowed in the building because Mr. Chorney was entitled to privacy because he lived there. So that's how this subject came up in the first place. So to start asking for continuances now or that -- to indicate what may

AMENDMENT NINE-UNENUMERATED RIGHTS

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."

Thus, while privacy is nowhere mentioned, it is one of the values served and protected by the First Amendment, through its protection of associational right, by the Third, the Fourth and the Fifth, and the Justice recurred to the text of the Ninth Amendment, apparently to support the thought that these penumbral rights are protected by one Amendment or a complex of Amendments despite the absence of a specific reference.

Thus, while contacting potential witnesses in a criminal case prior to an indictment is not mentioned in the Sixth Amendment, it is one of the values served and protected by the First Amendment, through its protection of associational rights by the Fourth and Fifth Amendments.

Because there is no case law involving the enjoinment of a defendant in a civil case from contacting potential witnesses in a related criminal proceeding does not mean that there is not an unenumerated right of the defendant to exercise the fundamental right of attempting to defend himself.

BACKGROUND

1. Harold F. Chorney was the principal of Cumberland Investment Corporation which was petitioned into an involuntary bankruptcy proceeding on November 8, 1989, which was converted into a Chapter 11 proceeding on December 5, 1989.

2. On April 15, 1990 the court appointed Examiner, Michael Weingarten submits a report to the court that Cumberland and Chorney are knowingly defrauding their customers.

3. Upon notification by defendant Chorney that the Examiner's appraiser of the assets of Cumberland was not a disinterested party and was actually a related party to the purchaser of the corporate assets and that this appraiser was chosen by the Examiner, the judge places this report under seal.

4. A five day hearing is held on Chorney's Motion to Strike the Examiner's Report #2 as a Sham and Deception on the Court. The last day of the hearings was June 22, 1990.

5. The Debtor's expert witness Charles Hoskins, who had travelled from Washington, D.C. on May 15, 1990 to view the coins was not granted accessibility to the coins by the Examiner.

6. On May 10, 1990, Chorney sends an FOIA to Postal Department. On May 30, 1990 Chorney receives a response indicating an investigation. The FOIA ia appealed on June 10, 1990. On July 19, 1990 a response from the Postal Service, which contained a copy of the Examiner's report #2.

7. The court in a ruling on July 12, 1990 denied the Motion to Strike and indicates that defendant Chorney fabricated the coin switching at Eastland Bank.

8. In an attempt to defend myself from the language of the court order, a letter is sent to my clients to inform them what is happening in the bankruptcy proceeding, and to inform them that Mr. Manter will be contacting them concerning the bankruptcy proceeding and a lawsuit against Eastland Bank and possibly others.

9. With each subsequent Examiner's report, the assets of the company are shrinking.

10. On July 25, 26, 30, 1990 a hearing concerning the appointment of a Trustee is held.

11. In a court order dated August 9, 1990, defendant Chorney is fired as operating Cumberland and a trustee is to be appointed to run the company.

12. On August 17, 1990 John F. Cullen is appointed to be trustee to Cumberland Investment Corporation.

13. On August 15, 1990 the Trustee and others commit an illegal search and seizure.

14. On August 20, 1990 the Trustee obtains a court order to redirect corporate mail.

15. On August 23, 1990 the Trustee obtains an order that enjoins defendant Chorney and his agents from contacting clients.

16. On or about September 20, 1990 a recording is placed upon all previous telephone lines at 141 Mains Street, Woonsocket, R.I. that were used by Cumberland Investment Corporation, Wescap, F.P.C. and Chorney personally. The recording stated:

> "By Court Order, Harold Chorney has been forbidden to talk about Cumberland business."

17. When defendant Chorney called William Tebbetts in the summer of 1991, Tebbetts stated:

> "I'm not supposed to talk to you."

18. On September 16, 1992 Chorney is indicted and discovers that Tebbetts is listed as a co-conspirator.

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NINTH AMENDMENT ARGUMENT

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

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

"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

The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from government infringement which exist alongside those fundamental rights specifically mentioned in the first eight amendments.

To hold that a right so basic and fundamental and so deep-rooted in our society as the right to contact individuals in order to defend oneself because that right is not guaranteed to a defendant prior to indictment in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.

"Ninth Amendment shows a belief of the Constitutions's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive."

Grossman v Gilchrist, 519 F. Supp 173 at 177 (1981)

Defendant Chorney claims that he had a constitutionally protected right to defend himself and that he was deprived of this right in violation of the Constitution and that this deprivation was intentionally caused and the act was done under color of law.

THE COURT: Why do you have to talk to customers, Mr. Chorney?
CHORNEY: Basic--
THE COURT: Because if I had my druthers, I'd rather not have you in touch with them.
CHORNEY: Basically, Your Honor, I'm being accused of various things and I'm not being given the opportunity to defend myself.

Transcript of Bankruptcy Hearing on January 8, 1992, R. 23

In effect, defendant Chorney had been enjoined from contacting potential witnesses on August 23, 1990 by the same judge who referred the criminal matter to the U.S. Attorney.

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"When judges appear to become 'accomplices in the willful disobedience of the Constitution they are sworn to uphold' Elkins v U.S. supra 223, we imperil the very foundation of our people's trust in the Government on which democracy rests."

U.S. v Calandra 414 U.S. 338 at 360

The right to contact individuals to defend oneself are protected by the First Amendment, through its protection of associational rights by the Fourth and Fifth Amendments.

The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information.

"Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized."

Rosenblatt v Baer, 383 U.S. 75 at 85

"The commands of our First Amendment (as well as the prohibitions of the Fourth and the Fifth) reflect the teachings of Entick v. Carrington. These three amendments are indeed closely related, safeguarding not only privacy and protection against self-incrimination but "conscience and human dignity and freedom of expression as well."

Frank v Maryland, 359 U.S. 360 at 376

At that time in Entick v Carrington, in 1765, it was not the searches for evidence that lead the British officials to ransack private homes, but rather it was the search for the nonconformist.

"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."....

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

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

"...we rightfully place a prime value on providing a system of impartial justice to settle civil disputes, we require even a greater insularity with fairness in criminal cases. Perhaps this is symbolically reflected in the Sixth Amendment's requirement of an "impartial jury" in criminal cases whereas the Seventh amendment guarantees only "trial by jury" in civil cases." The point to be made is that the mere invocation of the phrase "fair trial" does not as readily justify a restriction on speech when we are referring to civil trials."

Hirschkop v Snead, 594 F2d 356

"The State by definition does not have any legitimate interest in persuing bad faith prosecution brought to retaliate for, or to deter, an exercise of a constitutional protected right."

42 U.S.C.A. §1983
Wilson v Thompson, 593 F2d 1375

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Defendant avers that the right to defend oneself preindictment, by contacting potential witnesses in his defense, does raise this unenumerated right to an equivalent constitutional status as other rights guaranteed by the Sixth Amendment to the Constitution.

The Ninth Amendment serves as a

> "savings clause to keep from lowering, degrading or rejecting any rights which are not specifically mentioned in the document itself."
>
> Gibson v Matthews, 715 F. Supp 181 at 187 (1989)

In this instant case, Defendant Chorney has been deterred from exercising his fundamental birthright to defend himself, be it by contacting potential witnesses prior to being indicted, which is protected by the First Amendment through the associational rights of the Fourth and Fifth Amendments.

Defendant Chorney feels that he cannot receive a fair trial having been enjoined by the government from contacting potential witnesses in order to present matters in his own defense, and that a basic and fundamental right so deep rooted in our society that is reserved to the people, although it is not enumerated in the first eight amendments to the Constitution in so many words, and enfringed upon by government should form the basis for grounds to dismiss this instant indictment.

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