EXHIBIT H

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA **Appellee**	:	
vs.	:	**CR. NO. 96-1187**
HAROLD F. CHORNEY **Defendant-Appellant**	:	

BRIEF OF THE APPELLANT

An appeal from a denial of a Motion for New Trial upon the grounds of newly discovered evidence.

Respectfully submitted,

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II. STATEMENT OF THE CASE

A. TRAVEL

Harold F. Chorney (hereafter, "Appellant or Chorney") was indicted by a Federal Grand Jury in the United States District Court for the District of Rhode Island and charged with an eighteen count indictment.

On May 27, 1993, after a jury trial, the Appellant was found not guilty on Counts I, and IX through XVIII of the indictment and was found guilty of Counts II through VIII for making false reports and statements to a federally insured bank. On March 4, 1994, the Appellant was sentenced before the Honorable Justice Pettine.

The Appellant was sentenced to a term of imprisonment of twenty-four months as to Counts II, III, IV, V, VII and VIII. Each of these sentences were to run concurrent. He was given a three month sentence as to Count VI which was to run consecutive to the other Counts for a total of twenty-seven months incarceration.

Chorney appealed his conviction to this Court upon several grounds. (See, Case No. 94-1343). After full brief and argument, by decision dated August 24, 1995, the Defendant's appeal was denied.

On March 1, 1995, during the pendency of the first appeal, the Appellant filed a Motion for a New Trial based upon the ground of newly discovered evidence.

The Trial Court Judge held the Motion in abeyance pending the outcome of the original First Circuit appeal. Once the appeal was denied, the Government responded to the Defendant's Motion however, by the time the Government responded to the Motion, additional, newly discovered evidence came to light prompting Chorney to file an expanded version of his Motion for New Trial.

The Government finally responded to this Motion and the Court rendered its ruling on March , 1996. Mr. Chorney is presently before this Honorable Court challenging the District Court Judge's denial of said Motion.

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B. FACTS

Appellant, Harold F. Chorney, was the President of a company named, Cumberland Investment Corporation. Cumberland Investment Corporation obtained a series of loans and loan extensions from Eastland Bank ultimately totaling Two Million Five Hundred Thousand ($2,500,000.00) Dollars by 1989. To obtain these loans, Cumberland pledged uncirculated Mint State Silver Dollars as collateral.

The value of an uncirculated silver dollar turns on its condition, which is rated on a "mint state" ("MS") scale. A silver dollar in MS-65 condition is considered a "gem" and is worth substatially more than a coin of MS-64 or lesser quality.

At all times Eastland Bank held coins from Cumberland Investment Corporation as collateral. The number of coins held by Eastland Bank during this period was as high as seven thousand eight hundred twenty (7,820) as of May, 1989. The value of the coins pledged to collateralize the Cumberland loan, was supposed to amount to twice the value of the loans themselves. The pledged silver dollars were appraised by William Tebbetts of the Mayflower Coin and Stamp Company. Tebbetts and Chorney had a business relationship which was undisclosed to Eastland Bank. Officials from Eastland Bank testified at trial that they relied upon the Tebbetts' appraisal in deciding how much to loan to Cumberland Investment.

In 1989, Sotheby's Auction House appraised the silver dollars held by the Bank. The Sotheby's appraisal was dramatically lower than the face value of the loan prompting an involuntary petition of Cumberland into bankruptcy and subsequent criminal proceedings against Mr. Chorney.

IV. ARGUMENT

A. The District Court Trial Judge Erred in Failing to Grant Appellant's Motion for a New Trial Based on Newly Discovered Evidence.

Rule 33 of the Federal Rules of Criminal Procedure provides that a motion for new trial "based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending, the court may grant the motion only on remand of the case."

B. Legal Standard For Granting A Motion For New Trial

The showing which a Defendant must make in order to warrant a new trial on the basis of newly discovered evidence is clearly established. The defense contends that the four (4) part test of ***United States v. Slade, 980 F.2d 27 (1st Cir. 1992)*** *and* ***United States vs. Natanel, 938 F.2d 302, 313 (1st Cir. 1991), cert. denied, _____ U.S. _____, 112 S. Ct. 986, 117 L.Ed.2d 148 (1992)*** can be met. The standard is:

1. the evidence was unknown or unavailable to the Defendant at the time of trial;
2. the failure to learn of the evidence was not due to lack of diligence by the defendant;
3. the new evidence is material; and
4. the impact of the new evidence is so strong that an acquittal would probably result upon retrial.

C. DISCUSSION

Subsequent to his conviction, Mr. Chorney discovered several items which if known at the time of trial, would have radically altered the theory of defense and may very well have resulted in an acquittal.

The Appellant will briefly summarize the newly discovered evidence and then proceed to explain how this information, had it been known at the time of trial, would probably have resulted in an acquittal of Mr. Chorney.

D. THE NEWLY DISCOVERED EVIDENCE

Mr. Chorney had contended since the inception of this case, that the coins he had pledged to collateralize his bank loans had been mishandled and/or switched. He had maintained this position prior to trial and continued to insist this was the case even on appeal.

In an effort to refute these contentions, the U.S. Attorney, requested FBI Agent John Truslow to conduct a painstaking, coin-by-coin inventory of all of the coins currently held by the FDIC which had previously belonged to Eastland Bank and had collateralized the Cumberland loan. (See, Appendix Exhibit "A"). Agent Truslow conducted his coin-by-coin inventory for the purpose of comparing the collateral as currently constituted with the Sotheby's coin-by-coin appraisal of the collateral conducted on or about October 3, 1989. (Appendix Exhibit "B"). The Sotheby's appraisal was the precipitating event for the institution of Bankruptcy proceedings for Cumberland Investment and the beginning of the criminal investigation of the Appellant. The intent of the Truslow Affidavit was to attempt to dispel once and for all the defendant's allegation that his coins had been tampered with. If the integrity of the Cumberland portfolio had been maintained, Agent Truslow's inventory should exactly match the Sotheby's appraisal of October, 1989. All of the parties agreed that if the coins had simply been stored in locked vaults for six years, they should not have increased in number nor should the quantity of the various years and mint marks have changed.

Instead of refuting Mr. Chorney's claim however, Agent Truslow's affidavit corroborates the fact that the coins viewed by Sotheby's had been tampered with. Besides a difference in the total number of coins that should have been in the bank vault, there are 149 coins that are different in terms of their designated year and mint mark from what should have been there. Apparently in an attempt to dilute the differences, agent Truslow's affidavit is filled with misleading and inaccurate

information. Reviewing the summary of Agent Truslow's analysis, provided to the defense by the government (Appendix Exhibit "C"), establishes the fact that a number of the coins viewed by Sotheby's in October 1989, which have been in the exclusive and continuous control of the bank, the court appointed examiners and the FDIC, are no longer there and other coins which were never seen by Sotheby's have now appeared in the inventory. Examples demonstrating that the coins have been tampered with are as follows:

E. THE TOTAL NUMBER OF COINS IS DIFFERENT

Agent Truslow states that Sotheby's counted (7,820) U. S. Silver dollars when in fact the actual number of coins contained within the typewritten Sotheby's Appraisal amounts to 7,822 (See, Appendix Exhibits "A" and "B"). This in itself is not that significant, but it is important to know because it is consistent with other discrepancies to follow. Agent Truslow counted 7,809 U. S. Silver dollars. Adjusting for the 10 coins which were sold from the collateral, agent Truslow's tabulation would amount to 7,819 coins, three coins less than reviewed by Sotheby's. Again, not a huge disparity, but surprising since both Sotheby's and the FBI Agent did a very painstaking coin by coin analysis and the coins have been under the exclusive care, custody and control of Eastland Bank, the Bankruptcy Court Appointed Examiners and the FDIC.

F. THERE ARE 141 COINS DIFFERENT FROM THE SOTHEBY'S APPRAISAL

Agent Truslow swears under oath that after subtracting the ten coins which were sold from the inventory only 10 coins did not match up as to year and mint mark between the Sotheby's appraisal and his inventory. This is false. In actuality, there are 149 coins that Agent Truslow wrote down as being presently in the Cumberland Inventory which are different from the coins identified by Sotheby's.

Once the figure is adjusted for the 10 coins sold from the inventory with the permission of the bankruptcy court there are still 141 instances where Agent Truslow in 1995, wrote down a coin as being in the Cumberland Inventory which was not listed by Sotheby's as being present in 1989. This discrepancy is in black and white and can easily be established by comparing the Truslow summary (Appendix Exhibit "C") and the Sotheby's Appraisal (Appendix Exhibit "B"). In no instance can any of the disparity be attributed to the defendant since, as the court will recall, the testimony at trial was that the collateral coins were kept locked in a vault and have remained there at all times either under the bank's control, the U.S. Trustee's control or the FDIC.

G. SPECIFIC EXAMPLES OF DISCREPANCIES BETWEEN SOTHEBY'S AND TRUSLOW

Specific examples of discrepancies in the inventory which have occurred while the coins have been under the exclusive control of Eastland Bank, the Court appointed Examiners, or FDIC are as follows:

- Sotheby's appraised 20 coins dated 1888-0. According to Agent Truslow, these coins have disappeared since there are none of these coins in the inventory he viewed.

- Sotheby's found 140 coins dated 1904-0 when they appraised the bank collateral. Agent Truslow only found 120 coins with this date, a shortfall of 20 coins.

- Conversely, Sotheby's never appraised any 1880-S silver dollars, yet Agent Truslow counted 6 individual 1880-S coins.

- Sotheby's never appraised any 1880-O silver dollars, yet Agent Truslow counted 20 individual 1880-O coins.

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- Sotheby's only appraised 100 1922-S dollars, Agent Truslow counted 119, or 19 more than there should have been.

H. BREAKDOWN OF THE DIFFERENCES WHICH HAVE OCCURRED SINCE OCTOBER 1989

Listed below is an analysis of the differences between the Sotheby's appraisal and the Truslow inventory.

YEAR & MINT MARK	OCT 1989 SOTHEBY	1995 ADJUSTED ** TRUSLOW	DIFFERENCES
1878 7/8 TF	34	33	1
1878 7 TF	102	103	1
1879-P **	481	479	2
1879-S	100	101	1
1880-O	0	20	20
1880-S	0	6	6
1882-P	320	314	6
1888-O	20	0	20
1890-P	240	239	1
1896-P **	60	59	1
1904-O	140	120	20
1922-P	1100	1079	21
1922-D	0	1	1
1922-S	100	119	19
1923-P **	683	684	1
1924-P	260	280	20
		TOTAL	141

**There were 10 coins that were sold to Bellasario Rare coins: (4) coins dated 1879-P, (1) 1882-O, (1) 1886-P, (1) 1896-P, (2) 1923-P and (1) 1934-P. These coins have been added back in to the totals for Agent Truslow thereby reducing the difference from 149 coins to 141 coins.

There were 48 combinations of year and mint mark among the collateral coins. Agent Truslow's figures differ from the Sotheby's figures in 16 out of the 48 issues, or fully one-third.

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Obviously, Agent Truslow did not appraise the coins, he is not trained to so. Grading is subjective and by definition differences in grade can arise from one appraiser to the next. What Agent Truslow did was objective. He and the F.B.I. Agent who assisted him simply counted coins and wrote down the year and mint mark.

By all accounts Sotheby's did a careful coin by coin tally over a number of days. Agent Truslow and the FBI Agent who assisted him were presumably just as careful and should have had little difficulty counting the coins and writing down their years and mint marks.

The defense contends the only explanation for the discrepancy is that collateral coins were removed and replaced with coins of lesser value. In the process of doing so, mistakes were made in switching the coins year for year or mint mark for mint mark. While it may sound far fetched that bank officials or others would go to such lengths to switch coins, one has to bear in mind the large amount of money these coins can bring. Significant discrepancies have occurred.

It is precisely because of the preposterous nature of the allegation and the lack of objective proof (since the client had claimed tampering as early as September, 1989, prior to Sotheby's) that defense counsel chose not to pursue a switched coin theory at the time of trial. Now there is objective proof which bootstraps evidence that the defendant presented to defense counsel. This evidence however, was perceived to be somewhat self serving and without objective corroboration. Now there is objective corroboration by the government's own agent.

The trial judge seemed to either overlook these discrepancies or ignored their significance. Applying the four part test of **Slade** and **Natanel** to these facts the Appellant clearly meets the requirement since: While the evidence (i.e., the coins) existed, the Truslow Affidavit did not exist consequently it was unavailable to the defense at the time of trial; the failure to learn of the evidence was not due to the lack

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of diligence of the defendant since the defense had requested and purportedly received all of the inventories and appraisals that existed furthermore, the Defense did not conduct its own appraisal of collateral since its contention was that the coins had already been switched or tampered with prior to the Sotheby's appraisal; the evidence is truly new because even though the Defendant contended the coins had been switched prior to the Sotheby's appraisal, he had not suspected the coins continued to be tampered with even after October, 1989 and again, Truslow's inventory did not exist prior to November, 1995; the defense contends that the impact of the new evidence is so great that an acquittal would probably result upon retrial since the only logical explanation for discrepancies of this magnitude is that the coins have been tampered with.

I. TRUSLOW'S INVENTORY DIFFERS FROM CUMBERLAND'S INVENTORY BY 103 COINS

Listed below is an analysis of the differences between the Cumberland Investment Corporation inventory of coins collateralizing the loan at Eastland, which was verified and signed for by Thomas Hollis, Senior Vice-President of Eastland, in December 1988 (Appendix Exhibit "D"), and agent Truslow's inventory of November, 1995:

YEAR & MINT MARK	12/88 C.I.C.	1995 TRUSLOW	DIFFERENCES
1878 8TF	75	74	1
1879-P	480	479	1
1880-S	0	6	6
1880-0	0	20	20
1882-0	680	655	25
1888-P	20	40	20
1888-0	20	0	20
1896-P	60	58	2
1921-D	310	309	1
1921-S	240	239	1
1922-P	1080	1079	1
1922-D	0	1	1
1922-S	120	119	1
1923-P	680	683	3
		TOTAL	103

Newly discovered is the fact that (20) 1888-O coins appeared in both the Cumberland Inventory and the Sotheby's inventory but not in the Truslow inventory.

Conversely, there are other coins which never appeared in the Cumberland inventory nor in the Sotheby's appraisal which now appear in the Truslow inventory. For example, the Truslow inventory includes (6) 1880-S, (20) 1880-O and (1) 1922-D, none of which appeared in either the Cumberland inventory or the Sotheby's appraisal. Again, these discrepancies have occurred while the collateral has been within the exclusive control of Eastland Bank or its successors. The defendant's claim that his coins had been switched would constitute a complete defense to the indictment. This newly discovered information concerning discrepancies lends credence to the defendant's claim.

J THE EASTLAND COLLATERAL DID NOT REMAIN INTACT

The defense had always been told by the government that the bank collateral remained intact at Eastland Bank in Woonsocket. Indeed, Per Baverstam on May 7, 1993, testified that "all the coins that were at Eastland stayed at Eastland."

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(transcript of 5/7/93; at page 71) Mr. Weingarten, the court appointed examiner corroborated this on May 5, 1993. *(transcript of 5/5/93; at page 82)*. Mr. Leidman, the Government's coin expert who appraised both the coins, collateralizing Cumberland's loan with Eastland, general inventory coins of Cumberland and the so called redemption client coins testified that the inventory coins of Cumberland were in Cranston and the collateral coins for the Bank loan were in Woonsocket. *(See testimony of Julian Leidman of 5/11/93; at page 99-100).*

For the first time, again in Agent Truslow's affidavit of November 8, 1995, the Defense has discovered that at some time prior to trial 953 U.S. Silver dollar collateral coins were removed from the vaults in Woonsocket to an Eastland Bank in Cranston, Rhode Island. According to Agent Truslow this was done by the bankruptcy examiners Michael Weingarten and Per Baverstam in order to test the value of the collateral, by having them examined and graded. Then, according to Agent Truslow on August 18, 1993, the coins were shipped from Cranston, Rhode Island to Woonsocket Rhode Island for safe keeping.

This newly discovered information is important for several reasons. First, based upon the representations of the Government and the testimony of Mr. Leidman, Mr. Weingarten and Mr. Baverstam, the defense had always been told all of the coins were kept intact at the bank vaults in Woonsocket. Now the defense discovers that this in fact is not the case. This information contradicts the in-court sworn testimony of Mr. Leidman, Mr. Weingarten and Mr. Baverstam. One of the reasons the defense did not interpose an objection to the chain of custody of the Cumberland coins or pursue a switched coin theory, was because of the understanding that the coins had been kept intact and under the exclusive control of Eastland Bank and the FDIC. Now it turns out that such was not the case. Additionally, from a numismatic standpoint, the evidence at trial clearly demonstrated that the manner in which these coins are handled has a direct and dramatic effect upon their value.

Again, the Trial Judge appears to have either ignored this argument entirely or failed to realize how the lack of this information prevented Mr. Chorney from pursuing an entire avenue of defense.

K. THE EXISTENCE OF VIDEOTAPES STILL PHOTOS AND A TRANSCRIPT

Defense counsel sent a letter to the prosecutor on January 5, 1993, specifically inquiring about the existence of a videotape of August 17, 1990, when the assets of the defendant's corporation were removed. (See, Appendix Exhibit "E"). Though defendant was not present when the assets were removed, during the course of the related bankruptcy proceeding he had been told that videos existed but had never seen them.

The government's attorney answered that he was unaware of any videotapes but that he would inquire of the U. S. Trustee. After a week or two, the U. S. Attorney provided counsel with an approximately 5 minute long videotape. Counsel was orally informed that this tape constituted the only videotape of which the Trustee or anyone on his behalf were aware. For all intents and purposes the video provided to counsel was useless. Portions of the tape are upside down, other portions appear to have been shot with the camera on the floor or a table hence, nothing of any significance is seen.

Dissatisfied with the video which was produced, counsel filed a Motion for Production of Evidence Favorable to the Accused. (See, Appendix Exhibit "F"). The motion, filed pursuant to the holding of Brady vs. Maryland, 373 U.S. 83 (1963), and its progeny, sought the production for purposes of inspection and copying of any and all evidence for use at trial, or in sentencing, of exculpatory or potentially exculpatory material. Paragraph 10 of the Motion sought the production "Any and all photographs, videotapes, negatives, motion picture films, or any other photographic

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reproduction of any nature, which may tend to impeach or affect the credibility of any witnesses whom the government intends to call at trial."

The government supplied no response. Subsequent to sentencing and during the pendency of this appeal, defendant has come into possession of information which proves that the removal of assets from Cumberland's premises on August 17, 1990, was the subject of not only one videotape, but three separate video cameras, three still photographers, and a stenographic transcript, all hired at the insistence of the U. S. Trustee. Moreover, numerous police and private security guards were hired to provide security.

To date defendant has been stonewalled in his attempts to obtain these videotapes and still photos from the U. S. Trustee, but has secured a copy of the transcript directly from Allied Court Reporters. (Appendix Exhibit "G") This transcript reveals that the removal of assets was done "in the context of a whole series of investigations, some of them civil, some criminal in nature." (Tr. of 8/17/90, @ pg. 3).

The Defendant contends that this information was within the control of the United States Government, that it was improperly withheld from him, that the information constitutes exculpatory evidence and that had the existence of this information been known prior to trial much more attention would have been paid by Counsel to his client's claim that the assets of his company had been altered, switched or mishandled. Additionally, the videotapes are important because they show the manner in which assets were mishandled by the court appointed examiners who are the same individuals who removed the 953 collateral coins to Cranston.

Defense counsel has not personally viewed the videotapes but has been told by Warren Taft, an individual who has viewed the tapes, that the tapes show bags of coins being stepped upon during the removal process. If anything was established at trial it was that the condition of the silver dollars determines their value. The

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relevance of the videotapes to the collateral silver dollars is that the same individuals who mishandled the inventory coins when they were removed from the client's business are the same individuals who may have mishandled the collateral coins when they were removed from Eastland in Woonsocket and brought to Cranston.

Agent Truslow's Affidavit of November 8, 1995, (Appendix Exhibit "A") states that he "remembers" defense counsel was offered the videotapes during a recess of a deposition in Toronto, Canada, at the end of January, 1993, (Appendix Exhibit "A" paragraph 5). Neither defense counsel nor the U.S. Attorney have any recollection of this event. Interestingly enough, when this same issue was raised on Appeal the government denied any knowledge of the videotapes. Then, a week later, a corrected brief was filed wherein Agent Truslow distinctly "remembers" overhearing a telephone conversation between defense counsel and Mr. Posner on or about January 15, 1993, when the tapes were supposedly offered to counsel and were refused[1]

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[1]Though the prosecution had no legal obligation to obtain bankruptcy trustee materials, defendant concedes the prosecutor inquired of Mr. Cullen and produced the sole videotape provided by him (Br. 25-26). Defense counsel claims he "was orally informed that this tape constituted the only videotape of which the Trustee or anyone on his behalf were aware" (Br. 26). We are reluctant to respond to defendant's improper extra-record claim with extra-record facts of our own, but we must correct this misleading claim, if only to satisfy the Court that the government takes seriously its disclosure obligations. On or about January 15, 1993, AUSA Seymour Posner, in the presence of FBI Special Agent John Truslow, telephoned defense counsel Scott Lutes and told him that a paralegal at Eastland's private law firm had just provided several additional videotapes that the trustee had made regarding the coins seized from Cumberland. AUSA Posner further stated that neither he nor Agent Truslow had viewed these videotapes, but that Mr. Lutes was welcome to do so. Mr. Lutes did not take advantage of this opportunity. Should defendant file a new trial claim, AUSA Posner and Agent Truslow are prepared to give affidavits to this effect. Gov't's Brief of January 19, 1995 at pg.25-6.

L. THE VIDEOTAPES, PHOTOGRAPHS AND TRANSCRIPT BOLSTER THE DEFENDANT'S CONSTITUTIONAL ARGUMENTS

Had counsel been aware of the existence of the videotapes, still photos and particularly a transcript, counsel would have pursued the 1st, 4th, 5th, 6th and 9th amendment arguments his client pressed concerning an illegal search of his premises, and violation of his due process rights by conducting a criminal investigation under the guise of a civil proceeding. All of these actions seem fundamentally unfair particularly when it is realized they took place at the same time that Mr. Chorney, his agents and employees were enjoined by an order of the Bankruptcy Court from discussing any aspect of his business.

Mr. Chorney's arguments were preserved by counsel's having filed a Motion to Dismiss pursuant to the reasoning of Anders v. California, 386 U. S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). Counsel filed the Anders styled Motion due to his perceived lack of corroboration or proof of the allegations his client was making. Contained within this motion are all of the Constitutional arguments Mr. Chorney desired to press. Had the videotapes, still photos and stenographic records been disclosed to counsel prior to trial much more attention would have been paid by counsel to his client's claim that his constitutional rights had been violated and that the assets of his company had been altered, switched or mishandled. To give an example of the type of information which would have advanced Mr. Chorney's constitutional arguments, the transcript of August 17, 1990, clearly infers that the U. S. Trustee, the numerous individuals in his employ, and the many police officers who provided security when the assets were removed from Cumberland's premises were acting "in the context in both civil and criminal investigations." (See Tr. of 8/17/90, @ pg. 3). Additionally the point is clearly established that the whole removal of assets operation is conducted by the U. S. Trustee's Office and as the Chapter 11 Trustee Mr. Cullen

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said: "The United States Trustee's Office, so you'll know, is part of -- an adjunct of the United States Department of Justice. " (Tr of 8/17/90, @ pg. 11). This newly discovered evidence bolsters Mr. Chorney's claim that the removal of these items from his premises, which were later turned over to the U. S. Attorney and subsequently the U. S. Grand Jury which indicted him, was conducted as a search for criminal evidence without the necessity of obtaining a search warrant. Even more impetus is added to this argument when considered with the fact that prior to Indictment, the U.S. Attorney handling Mr. Chorney's case appeared in at least two civil bankruptcy hearings and the U.S. Bankruptcy Court Judge seemed well aware of the dual civil/criminal investigation. Consider this excerpt from a January 8, 1992, Bankruptcy Court hearing concerning the dissolution of the Bankruptcy Court Order enjoining Mr. Chorney from speaking with people about Cumberland business:

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

The Court: Right. And - -

Mr. Chorney: Will I get to review that prior - -

The Court: Oh, Yeah. Before it's signed you'll get to see it.

Mr. Chorney: Let's get back to the mail, also, Your Honor. I think that - -

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 - -

Mr. Posner: Understood.

The Court: Attitudes, okay?

Mr. Posner: Understood. Thank you.

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(Transcript of January 8, 1992, at pg 26. Appendix Exhibit "H")

M. THE FAILURE TO PROVIDE THE VIDEOTAPES AND PHOTOGRAPHS WAS A VIOLATION OF RULE 16

> **Rule of Criminal Procedure 16(C) provides:**
> Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

In order to succeed on a claimed violation of Rule 16 of the Federal Rules of Criminal Procedure, a defendant must demonstrate that he has been prejudiced. United States vs. Hemmer, 729 F.2d 10 (1st Cir. 1984).

In light of the unambiguous request of the defendant and the government's lack of response, there is a clear violation of Rule 16.[2] Moreover, the government cannot seriously contend that the information was not within their control since both the U. S. Attorney and the U. S. Trustee are part of the same U. S. Department of Justice.

Moreover, the non-disclosure of this information altered the entire presentation of the defense at trial. Throughout the entirety of this case the defendant had desired for counsel to pursue as one avenue of defense a "switched coin theory". This fact is evidenced by the defendant's desire to enter an appearance as co-counsel, his statements made during allocution, and his continued pursuit of information post-verdict. Counsel did not pursue this avenue primarily due to lack of corroboration of

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[2]Defendant does not press the argument that the disclosure of the roughly 5 minute long videotape was proferred as a subterfuge or any expression of bad faith of the instant prosecutor.

many of the allegations the defendant made.[3] This lack of information also directly resulted in counsel's advice to the defendant to not testify in his own defense. Indeed, the very fact of the non-disclosure (or suppression) of the videos, photos, etc., buttresses the defendant's allegation of a cover-up of tampering with the assets.

N. NON-DISCLOSURE OF THE VIDEOTAPES AND PHOTOGRAPHS CONSTITUTED A BRADY VIOLATION

The defendant contends that the non-disclosure of this information which was clearly in the possession of the government prior to trial, and may, according to the statements attributed to the U. S. Trustee Cullen, have been compiled partly in furtherance of the criminal prosecution of this case, resulted in a violation of his due process rights to the extent that a new trial is warranted.

In order to succeed on a Brady claim, a defendant must show that the evidence was exculpatory, as measured by its materiality. United States vs. Hemmer, 729 F.2d at 14. "A threshold inquiry in this context is whether the discovery request was specific or general." Id. In order to be "material" the evidence must be "obviously exculpatory" in nature or "of sufficient significance to result in the denial of the defendant's right to a fair trial." Hemmer at 14, citing United States vs. Ferreira, 625 F.2d 1030, 1033-34 (1st Cir. 1980) and United States vs. Agurs, 427 U. S. 97, 108,96 S. Ct. 2392, 2400, 49 L.Ed.2d 342 (1976).

Mr. Chorney, through counsel made a specific request (even referring to the date the videos were supposed to have been taken in its letter of January 5, 1993) for

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[3]The defense possessed correspondence from the defendant to the bank raising this point prior to the instigation of criminal proceedings. Additionally, an inventory produced after trial, but prior to sentencing, conducted by the Federal Deposit Insurance Corporation suggested there were approximately 1,100 fewer coins than there should have been in the bank's inventory. The newly disclosed information that 953 coins were moved from Woonsocket to Cranston tends to corroborate the defendant's allegations.

the production of videotapes (and photographs) it believed should have been in the possession of the government both in letter form and later in a Motion for the Production of Evidence Favorable to the Accused. Supposedly after making inquiry, a useless five minute video was produced. The defendant contends that the non-production of the several videotapes and numerous photographs and the stenographic record of the more than 11 hour removal of the assets process which detailed the condition of the coins as they were being removed from the defendant's premises, in light of the nature of the items and the line of defense Mr. Chorney obviously desired to employ, resulted in a deprivation of his right to a fair trial. At a minimum it also resulted in prejudice in sentencing since the videos and photographs bore directly on the issue of valuation.

A criminal defendant has an absolute right to pursue the theory of defense best suited to vindicate his rights. In the case at bar, due to the government's actions, an entire line of defense was foreclosed. The defendant was prejudiced by his counsel's strategy not to confront the switched coin issue. This prejudice was heightened by the jury's consideration of the testimony of Per Baverstam, who testified that the defendant raised a switched coin defense only after some appraisal results had come back lower than expected. The inference of this testimony surely was that Mr. Chorney knew he was guilty of over valuation of the assets and was making an implausible excuse for the appraisal results.

Therefore, it is clear that the impact of the new evidence is so strong that an acquittal would be likely upon retrial. In addition, this Court should consider the fact that the jury on the Trial Court level, did not wholeheartedly find for the Government in that they acquitted Mr. Chorney on eleven of the eighteen charges against him.

Therefore, if the jury was presented with the switched coin theory, as well as all the evidence discovered in pursuit of this theory, it is likely that this jury would

VI. DESIGNATION OF CONTENTS OF APPENDIX

EXHIBIT A ..... Affidavit of John Truslow

EXHIBIT B..... Appraisal of Sotheby's

EXHIBIT C..... FBI Inventory Summary

EXHIBIT D ..... Inventory of Eastland Savings Bank

EXHIBIT E..... Letter Dated January 5, 1993 to Seymour Posner, AUSA

EXHIBIT F..... Motion for Production of Evidence Favorable to the Accused

EXHIBIT G ..... Transcript of Police Briefing at Woonsocket Police Station

have acquitted the Appellant on Counts II through IX as well as those they acquitted on Count I and Counts X through XVIII.

V. RELIEF SOUGHT

The Appellant is seeking a reversal of the Trial Court Judge's denial of a Motion for New Trial upon the grounds of newly discovered evidence. This matter should be remanded for retrial in order that the Appellant may have an opportunity to present his switched coin defense with the benefit of the above-referenced newly discovered evidence. In the alternative, this matter should be remanded for further evidentiary proceedings and a more detailed decision from the trial Justice in order that the Appellate Court may have a more accurate record to review.

VII. CERTIFICATION

I hereby certify I mailed a true copy of the within Brief, postage pre-paid to Seymour Posner, Esq., First Assistant United States Attorney, and Margaret E. Curran, AUSA, 10 Dorrance Street, Providence, Rhode Island 02903 on the 14th day of June, 1996.

Donna M. Lazzaro