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To Be Argued By
Robert S. Litt

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

KUANG HSUNG J. CHUANG,

Defendant-Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLANT
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ISSUES PRESENTED

1. Whether a warrantless search of a bank pursuant to 12 U.S.C. §481 violates the Constitution.

2. Whether the receiver for a bank may conduct a warrantless search of an independent law firm located in the bank's building.

3. Whether the District Court should have severed an unrelated conspiracy count.

4. Whether counts that charge violations of more than one clause of 18 U.S.C. §1001 are duplicitous.

5. Whether transactions that pose no risk of pecuniary loss may constitute misapplications of bank funds.

6. Whether a wire fraud conviction may stand where there was no evidence of intent to deprive anyone of property.

7. Whether the District Court improperly admitted hearsay evidence.

8. Whether the District Court's jury instructions on certain false statement counts shifted the government's burden of proof to the defendant.

9. Whether the sentence in this case was illegally imposed.

PRELIMINARY STATEMENT

Kuang Hsung J. Chuang appeals from a judgment of conviction entered on August 1, 1989, in the United States District Court for the Southern District of New York, after a four-month trial before the Hon. Miriam Goldman Cedarbaum, United States District Judge, and a jury.

Chuang (whose American name is Joseph), an immigrant from Taiwan, founded the Golden Pacific National Bank ("the Bank"), the first Chinese-controlled bank in New York City's Chinatown. Principally through Chuang's efforts, the bank was a remarkable success, growing to over $150 million in assets and providing a unique service to the Chinese American community. But in June 1985, agents of the Office of the Comptroller of the Currency ("OCC") conducted a surprise warrantless raid on the Bank to inspect records pertaining to a bank product known as "non-negotiable certificates." As a result of this raid, the OCC declared the Bank insolvent -- although by the time of trial it was apparent that the assets of the Bank had exceeded its liabilities and the Bank therefore had not been insolvent.

On May 19, 1987, Chuang and his chief assistant, Theresa Shieh, were indicted in a 48-count indictment. Prior to trial, defendants moved to dismiss the indictment on various grounds, including duplicity and failure to state an offense. Defendants also moved to suppress evidence obtained by the OCC during its warrantless search of the Bank and by other federal

agents during a subsequent warrantless search of the offices of Chuang's law firm. The District Court denied these motions.[1/]

Prior to trial, two superseding indictments were filed and several counts were severed; at the close of the government's proof the court dismissed certain other counts. The case was therefore submitted to the jury in 22 counts. Count 1 charged defendants with conspiring to defraud the United States and to make false statements and misapply bank funds, in violation of 18 U.S.C. §371. Counts 2 to 11 charged the defendants with making false statements and concealing material information in certain financial statements submitted by the Bank to the OCC, known as "call reports," in violation of 18 U.S.C. §1001. Counts 12 to 14 charged defendants with making false statements about the non-negotiable certificate program to OCC regulators, also in violation of 18 U.S.C §1001.[2/] Counts 15 to 20 charged defendants with misapplication of bank funds, in violation of 18 U.S.C. §656. Count 21 charged Chuang alone with an unrelated conspiracy to cover up illegal campaign contributions made with bank funds, in violation of 18 U.S.C. §371. And Count 22 charged both defendants with defrauding purchasers of non-negotiable certificates, in violation of 18 U.S.C. §1343.

Trial began on September 26, 1988, and ended on January 18, 1989, when the jury returned a verdict of guilty on all

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1/ Relevant district court decisions are reproduced in the Appendix. One of the decisions also is reported at 696 F.Supp. 910.

2/ Shieh was not named in Count 12.

counts. Sentencing was a protracted proceeding, because of a dispute among the prosecutors, Chuang, and the Federal Deposit Insurance Corporation ("FDIC") concerning whether restitution should be ordered and, if so, in what amount. After several appearances and much correspondence, the court entered judgment on August 1, 1989, sentencing Chuang to concurrent terms of five years' imprisonment on all counts and ordering him to pay restitution of $200,000 pursuant to 18 U.S.C. §§3663-64. Notice of appeal was timely filed on August 9, 1989.[3/]

STATEMENT OF FACTS

This case concerns a bank product known as the non-negotiable certificate. At the time the Bank began to sell non-negotiable certificates, federal law barred national banks from offering higher than a specified rate of interest on regular certificates of deposit. Tr. 8031.[4/] The Bank developed the non-negotiable certificate program in order to allow customers to obtain a return on their monies in excess of this ceiling. A. 115; Tr. 8032. The premise of the program was that the monies used to buy non-negotiable certificates were "custodial account funds," rather than deposits. Tr. 1903-04.

3/ Chuang is now serving his sentence.

4/ In this brief, "Tr." will refer to the trial transcript. Transcripts of pre-trial or post-trial proceedings will be cited as "[Date] Tr." "A." will refer to the Appendix. Citations to the indictment will be to the Redacted Second Superseding Indictment, reproduced in the Appendix, upon which the case went to the jury.

Custodial account funds are monies that a bank invests as agent for a customer. Whereas a bank is liable to customers for repayment of deposits, the bank is not liable for repayment of custodial account funds; the business in which the bank invests those funds is instead responsible for repayment. A. 177. Moreover, whereas the FDIC insures deposits (because they are liabilities of the bank), the FDIC does not insure custodial account funds. These differences between deposits and custodial account funds are reflected in federal reporting requirements. A bank must report all deposits to the OCC on forms known as "call reports," but need not list custodial account funds on such forms. Id.

Chuang treated the non-negotiable certificate program as a non-deposit, custodial program.[5] The Bank placed all of the proceeds of the sale of non-negotiable certificates in a discrete account and used these funds to make a variety of investments not made with regular deposits.[6] In addition, the

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[5] Count 22 of the indictment, charging wire fraud, alleged that, although Chuang treated the program as a non-deposit program, he misled purchasers of non-negotiable certificates into believing that they had made regular deposits. Part VI of this brief argues that even if Chuang deceived bank customers in the manner the government maintained at trial, his actions did not constitute wire fraud.

[6] Some of these investments became the basis of the misapplication charges in the indictment. In these counts, the government challenged the use of non-negotiable certificate monies to purchase bank stock and to make loans to a New York restaurant and two companies located in Taiwan. See A. 30-38. Part V of this brief argues that certain of these investments were not misapplications because they posed no risk of pecuniary loss to the Bank or its customers.

Bank did not list the non-negotiable certificate funds on its call reports.[7]

Bank regulators knew of the non-negotiable certificate program almost from its inception. In 1980, OCC agents reviewed the program without challenging it in any way. Tr. 822, 830. The next year, OCC examiners conducted a more thorough evaluation of the program. At the end of this examination, the OCC concluded that the program was a deposit program, rather than a custodial program, and that the Bank should treat non-negotiable certificates in the same manner as it treated regular deposits. Tr. 1912. The Bank disputed this view in a letter written by the Bank's counsel (Cadwalader, Wickersham & Taft), which argued that the non-negotiable certificate program was a custodial program. Tr. 1894. The Bank never received a response to this letter, and the OCC agents who performed the next bank inspection did not raise questions about the program. Tr. 1936, 2024.

In December 1981, the Federal Reserve Bank ("FRB") wrote to the Bank to ask about the sale of non-negotiable certificates. Tr. 2024. Once again, Cadwalader responded to the questions in writing, and several months later bank officials and counsel met with FRB employees to discuss the program. Tr. 1914. At the end of this meeting, the FRB approved the Bank's treatment

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[7] The Bank's failure to report the non-negotiable certificate funds on the call reports formed the basis of Counts 2 to 11 of the indictment. The government charged that these funds were deposits and that the Bank therefore was required to list them on the call reports. Part IV of this brief argues that Counts 2 to 11 were duplicitous. Part VIII argues that the District Court's jury charge impermissibly shifted the burden of proof on these counts to the defendants.

of the program. Tr. 1838. When the OCC again raised questions about the program in the summer of 1982, intimating that non-negotiable certificate funds should be treated as ordinary deposits, bank officials noted the FRB's ruling, and the OCC deferred to it. Tr. 1489-90. Both the OCC and the FRB thus knew of the non-negotiable certificate program, as well as of the Bank's view that the proceeds of the program were not deposits, throughout the lifespan of the program.

Until the Bank was closed, not a single bank customer complained about any aspect of the non-negotiable certificate program. Nor did bank customers have any apparent reason to complain. Prior to the closing of the Bank, each purchaser of a non-negotiable certificate received full payment, including appropriate interest, when his certificate became due. Tr. 2744-45. In other words, each customer received exactly what he was entitled to receive under the terms of his certificate.

In 1985, however, a former employee of the Bank, whom Chuang had accused of participating in a check kiting scheme, went to federal authorities and alleged misconduct in the Bank's operation of the non-negotiable certificate program. 3/10/88 Tr. 238-43; Tr. 7924. Largely on the strength of her allegations, OCC agents conducted a surprise warrantless examination of the Bank on June 17, 1985 with the avowed purpose of investigating all aspects of the program. 3/10/88 Tr. 247-54.[8/] Most of the

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8/ Counts 12 to 14 of the indictment charged that certain statements allegedly made about the non-negotiable certificate program to OCC officials during this

(continued...)

evidence offered against Chuang derived from this warrantless OCC examination.[9]

On June 21, 1985, at the close of the examination, the OCC agents demanded that Chuang, Shieh and bank counsel attend an emergency meeting to discuss the Bank's solvency. At this meeting, the examiners expressed doubts that the investments made with non-negotiable certificate funds carried a value equal to the amount of liability that the agents believed the outstanding certificates represented. Tr. 1638-40. Chuang, Shieh, and their counsel responded that these investments were of sufficient value to allow repayment of all outstanding certificates, and asked for a small period of time to liquidate the investments to establish their value. Tr. 1467-73, 1793-95. At the close of the meeting, the OCC examiners denied this request and declared the Bank insolvent. Tr. 1808. The OCC thus closed the Bank and appointed the FDIC as receiver.

The next day, FDIC agents began a full-scale examination of the entire bank building. A. 59. A law firm owned by Chuang was located on the third floor of this building. FDIC officials conducted a warrantless search of the law firm simultaneously with their inspection of the Bank itself. Id. The District Court admitted evidence derived from the search of

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[8] (...continued)
examination, as well as others made earlier, were false. Part IV of this brief argues that these counts were duplicitous.

[9] Part I of this brief argues that the OCC search was unconstitutional.

this law firm to prove certain counts of the indictment. Tr. 3128, 5485-95.[10/]

Later events demonstrated that the OCC had erred in declaring the Bank insolvent and appointing the FDIC as receiver. The FDIC ultimately sold the assets in which the non-negotiable certificate funds had been invested for almost exactly the amount owed to the persons holding the certificates. Tr. 6789, 6803. Moreover, as of the time of trial, the FDIC's own balance sheet showed that the total recoveries from bank assets exceeded the total liabilities of the Bank by almost $9 million. A. 266. Chuang's representations to the OCC at the June 21 meeting -- that the Bank was solvent and that it would be able to redeem all outstanding non-negotiable certificates -- thus proved accurate.

Notwithstanding the absence of any loss to customers resulting from the non-negotiable certificate program, Chuang and Shieh were indicted. The proof at trial focused on three issues:

- whether Chuang led bank customers to believe that the funds used to purchase non-negotiable certificates were standard deposits;
- whether Chuang's use of non-negotiable certificate monies, once obtained, exposed the Bank and its customers to undue risk of loss; and
- whether the OCC's and FRB's approval of the non-negotiable certificate program gave Chuang reason to believe that the Bank's operation of the program complied with legal requirements.

In attempting to prove that Chuang deceived bank customers, the government placed on the witness stand a number of

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10/ Part II of this brief argues that the FDIC search of Chuang's law offices was unconstitutional.

purchasers of non-negotiable certificates who testified that they believed they were buying ordinary certificates of deposit, backed by the Bank and insured by the FDIC. Tr. 7664-68. The government also called bank employees who stated that they had encouraged customers to believe that non-negotiable certificates were ordinary deposits. Tr. 7673. Other customers testified, however, that they had been fully informed of the terms and conditions of the non-negotiable certificate program, and some bank employees testified that they indeed had told customers of these facts. Tr. 6647, 6815, 6821, 6831. More importantly, uncontested evidence showed that Chuang himself had issued memos and made a training videotape instructing bank employees to disclose to customers each of the terms and conditions of the program. Tr. 6554, 7997-98. Although bank employees may have failed to comply with his instructions, Chuang thus attempted to ensure that purchasers of non-negotiable certificates were informed about the nature of their investment.

The second aspect of the government's case concerned the Bank's use of the proceeds of the non-negotiable certificate program. The government and the defense essentially agreed on what investments were made with the non-negotiable certificate monies; where they parted paths was in characterizing the risks associated with these investments. The government contended that the investments -- some of which were charged as misapplications -- posed an undue risk of loss to the bank. Tr. 7747. In making this claim, the government alleged that either Chuang or Shieh had a personal interest in several of the assets in which

certificate funds had been invested. Tr. 7771, 7858. The defense, on the other hand, presented evidence that the assets in which the funds had been invested carried real value, and that the particular transactions charged as misapplications posed no risk of loss to the Bank. Tr. 6245-47, 8247-55.

Finally, the parties disputed whether the approval of the non-negotiable certificate program by the OCC and FRB gave Chuang a good-faith basis to believe that the Bank's operation of the program was lawful. The defense argued that Chuang had a right to rely on the opinions of the OCC and FRB as establishing the legality of the certificate program. In response, the government asserted that the OCC and FRB actions were themselves the product of misrepresentations that Chuang had made to the regulators. Tr. 8753-55. The government focused on Chuang's meeting with the FRB, claiming that Chuang had stated falsely at the meeting that the non-negotiable certificates were sold only to sophisticated customers and that the certificate program was part of the Bank's (non-existent) trust department. A. 91-93. No FRB official, however, recalled what Chuang had said at the meeting; the only support for the government's account of the meeting was a subsequently prepared memorandum. A. 69, 91-93; Tr. 1856.[11/] By contrast, an attorney present at the meeting

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11/ Part VII of this brief challenges the admission of this memorandum on the ground that it was inadmissible hearsay.

testified that Chuang had not made the representations stated in the memorandum. Tr. 2062-63.[12/]

ARGUMENT

I. THE OCC'S WARRANTLESS SEARCH OF THE GOLDEN PACIFIC NATIONAL BANK VIOLATED THE FOURTH AMENDMENT

The bulk of the government's proof at trial derived from the OCC's surprise search of the Bank. The OCC made this search pursuant to 12 U.S.C. §481, which authorizes warrantless examinations of national banks by examiners appointed by the Comptroller of the Currency. Chuang objected to the use at trial of the fruits of the search on the ground that 12 U.S.C. §481 violates the Constitution. The District Court ruled that Chuang lacked standing to make this challenge. A. 63, 66. In so holding, the District Court misconstrued Fourth Amendment standing law. Moreover, had the court ruled on the merits of Chuang's arguments, it properly could have reached only one conclusion: that 12 U.S.C. §481 is invalid under the Fourth Amendment. Introduction of the evidence garnered in the OCC search therefore was improper, and Chuang's conviction, which was based largely on this evidence, must be reversed.

The search at issue began on June 17, 1985, when three examiners, claiming to act pursuant to 12 U.S.C §481, entered the

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12/ Some trial testimony also concerned a charge unrelated to the non-negotiable certificate program. In Count 21, the government charged Chuang alone with a conspiracy to cover up the use of bank funds to make campaign contributions. Part III of this brief argues that the District Court should have severed this count.

Bank without a warrant[13] and without prior notice[14] and demanded to meet with Chuang. 3/10/88 Tr. 247-49. At the meeting, the examiners produced an administrative subpoena and instructed Chuang to make available to them a wide variety of bank documents, most of which related to the non-negotiable certificate program. Id. at 253-54. Responding to the examiners' show of authority, Chuang directed Shieh to produce these documents. Id. at 254; Tr. 83, 88-90. Throughout the week, the examiners camped at the Bank and inspected these and other documents before, during, and after normal business hours. 3/10/88 Tr. 232; Tr. 92. Certain file cabinets and areas of the Bank were sealed during the search, and the movements of bank employees were to some extent restricted.[15] 3/10/88 Tr. 262-63; Tr. 91-92. The inspection was in all respects the equivalent of a week-long search of the Bank by government agents. Cf. New York v. Burger, 482 U.S. 691, 699 (1987) (administrative inspections are "searches" for purposes of the Fourth Amendment).

The District Court's ruling that Chuang lacked standing to challenge this search appeared to rest on a belief that a bank official cannot have a legitimate expectation of privacy in any

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13/ Prior to entering the Bank, the OCC examiners had asked an Assistant United States Attorney to apply for a warrant to search bank records. The prosecutor refused this request. The OCC examiners decided to proceed with the search in the absence of a warrant. 3/10/88 Tr. 231-32.

14/ The Bank had received notice prior to all previous examinations conducted by OCC agents. 3/10/88 Tr. 250.

15/ While the search was proceeding, the OCC examiners regularly informed the United States Attorney's Office of its progress and results. 3/10/88 Tr. 233-35.

bank premises other than, conceivably, his own office.[16/] In articulating and applying a per se rule of this kind, the court misapprehended Fourth Amendment standing law. The Fourth Amendment protects corporate premises, and a corporate officer -- including a bank officer -- may have a sufficient expectation of privacy in these premises to confer standing to contest a search. United States v. Brien, 617 F.2d 299, 305-06 (1st Cir.), cert. denied, 446 U.S. 919 (1980); United States v. Lefkowitz, 464 F. Supp. 227, 230-31 (C.D. Cal. 1979), aff'd, 618 F.2d 1313 (9th Cir.), cert. denied, 449 U.S. 824 (1980). The determination whether a corporate or bank officer has such standing is essentially factual and turns on a number of interrelated factors. Among these factors are whether the officer has a proprietary interest in the business, whether the officer exercises significant control over the business and the particular premises searched, whether the premises are open to the public or only to persons who have the permission of the officer, and whether the officer is present on the premises at the time of the search. United States v. Horowitz, 806 F.2d 1222, 1225 (4th Cir. 1986); United States v. Moscatiello, 771 F.2d 589, 601 (1st Cir. 1985), vacated on other grounds sub nom. Murray v. United States, 108 S. Ct. 2529 (1988); United States v. Brien, 617 F.2d at 305-06; United States v. Lefkowitz, 464 F. Supp. at 230-31. Only upon a consideration of such factors,

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16/ See Tr. 88-90; 7/24/89 Tr. 20-22 (Chuang could have no legitimate expectation of privacy "in a national bank which purported to be a national bank"; "[w]e are not talking about anybody's home or private safe").

completely ignored in this case, could the District Court properly have resolved the standing question.

An analysis of these factors demonstrates that Chuang had standing to challenge the OCC search. Chuang had a significant proprietary interest in the Bank: according to the government, he or his family owned almost half of all outstanding bank stock at the time the Bank was closed. See Tr. 7857. Perhaps more important, the trial record demonstrates significant operational control by Chuang over the Bank and all of its premises. As the government argued in its summation, "the evidence . . . shows that Dr. Chuang did have his fingers in every area of the bank." Tr. 7939.[17/] Further, the particular areas searched by the OCC examiners were in non-public areas of the Bank, ultimate control over which rested in Chuang's hands. Finally, Chuang was present during the OCC's search of the Bank. Chuang, in short, exercised complete control over the Bank at the time the OCC agents conducted their search. Chuang therefore had standing to contest the legality of the search, and the District Court should have considered the merits of his claim.

Had the court done so, it would have confronted a well-established body of law delineating the permissible scope of statutes authorizing warrantless searches of commercial premises. The Supreme Court has made clear that "the Fourth Amendment's prohibition against unreasonable searches applies to

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17/ See also Tr. 491 ("Dr. Chuang clearly was the dominating factor in the bank"); Tr. 2053 (Chuang was knowledgeable about all affairs of the bank); Tr. 3057 (Chuang personally approved most loans, no matter how small, made by the Bank).

administrative inspections of private commercial" enterprises, Donovan v. Dewey, 452 U.S. 594, 598-99 (1981), even when such enterprises are in a "closely regulated" industry such as banking. New York v. Burger, 482 U.S. at 699-700. Although statutes authorizing warrantless administrative searches of commercial property do not necessarily violate the Fourth Amendment, such statutes "must provide a constitutionally adequate substitute for a warrant" in order to pass Fourth Amendment muster. Id. at 703. Specifically, the statute "must perform the two basic functions of a warrant: it must advise the owner of a commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers." Id. In order to perform these functions, the Supreme Court has held, the statute must carefully delineate the "time, place, and scope" of the authorized inspections. United States v. Biswell, 406 U.S. 311, 315 (1972); see New York v. Burger, 482 U.S. at 703.[18/]

The statute at issue in this case, 12 U.S.C. §481, does not meet constitutional standards because it gives OCC agents

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18/ In accord with these principles, the Supreme Court in Marshall v. Barlow's, Inc., 436 U.S. 307 (1978), struck down a statute authorizing warrantless regulatory inspections on the ground that it "devolve[d] almost unbridled discretion upon executive and administrative officers . . . ." Id. at 323. Lower courts frequently have invalidated similar statutes on this basis. See, e.g., McLaughlin v. Kings Island, 849 F.2d 990 (6th Cir. 1988); Serpas v. Schmidt, 827 F.2d 23 (7th Cir. 1987), cert. denied, 108 S. Ct. 1075 (1988); Allinder v. Ohio, 808 F.2d 1180 (6th Cir.), appeal dismissed, 481 U.S. 1065 (1987).

unbridled discretion in examining bank records. The statute provides in pertinent part as follows:

> The Comptroller of the Currency . . . shall appoint examiners who shall examine every national bank as often as the Comptroller of the Currency shall deem necessary. The examiner making the examination of any national bank shall have power to make a thorough examination of all the affairs of the bank . . . .

Limits on the "time, place, and scope" of inspection, which alone provide a constitutionally adequate substitute for a warrant, nowhere appear in this statute. The OCC has unbounded authority to determine the frequency and timing of bank examinations. The statute contains no limits or guidelines as to the number of times a bank may be examined in a year or as to particular hours or days when inspections may be made. Similarly, the statute places no limits on the breadth or scope of an examination. Instead, the statutory language permitting a "thorough examination of all the affairs of a bank" invites the examiner to do as he pleases. The result is to place unfettered discretion in the hands of OCC examiners. It is precisely this danger against which the Supreme Court has inveighed in requiring that statutes authorizing warrantless searches provide a constitutionally adequate substitute for a warrant. Even a closely regulated business such as banking cannot, consistent with the Fourth Amendment, be so subject to the arbitrary whim of government agents.

The documents obtained in the OCC's search of the Bank formed the basis of the government's case against Chuang, and the

government has never contended to the contrary. These records provided the government's proof about the operation of the non-negotiable certificate program and the use of the funds that the program raised. The documents were admitted at trial to prove each and every count of the indictment. Accordingly, Chuang's conviction should be reversed.

II. THE FDIC'S WARRANTLESS SEARCH OF CHUANG'S LAW OFFICES WAS UNCONSTITUTIONAL

The government's proof included documents obtained as a result of a warrantless search of Chuang's law offices by FDIC officials after the FDIC became receiver for the Bank. Chuang objected to the admission of all documents obtained as a result of the law firm search, but the District Court allowed them into evidence. In doing so, the court erred. The documents were obtained as a result of an illegal search, and the convictions based on this evidence must be reversed.

Chuang's law firm -- Chuang and Associates -- was located on the third floor of the bank building. Although the firm provided legal services to the Bank, the firm was, as the District Court found, a separate entity. A. 59. Nonetheless, FDIC officials searched the law firm without a warrant. According to an FDIC attorney, the rationale for conducting this search was that "the building was under receivership because the bank was located in the building." 3/9/88 Tr. 174 (emphasis added). On this reasoning -- which would allow the FDIC to search the entire Citicorp Center if Citibank were to go into receivership -- the FDIC searched the offices of Chuang, his

secretary, and four of his associates.[19/] A. 59; 2/26/88 Tr. 94; 3/9/88 Tr. 107-08, 132, 137. Chuang does not contest that the FDIC, if properly appointed receiver of a bank, has authority to examine the bank itself without a warrant. 12 U.S.C. §1821(d). Chuang challenges, however, the FDIC's search of his independent law offices as going beyond any rightful authority of a receiver.

Two kinds of evidence that derived from the FDIC's search of Chuang's law offices came into evidence at trial. First, the government introduced liquor license applications submitted to the New York State Liquor Authority by Chinatown Kite Restaurant, Inc. and Second Avenue Restaurant, Inc., to show that Chuang's wife owned an interest in these companies. Tr. 5485-95. This proof was integral to the government's theory on Counts 19 and 20 that certain transactions involving the restaurants were misapplications of bank funds. Tr. 8343-44. Second, the government introduced numerous items, including dividend lists, respecting the ownership of bank stock. Tr. 3128; 7/24/89 Tr. 18-20. These documents formed the basis of the charges in Counts 17 and 18 that Chuang wrongfully purchased bank stock in nominee names. Tr. 7830-37; 7/24/89 Tr. 18-20.

Chuang contended that the court should exclude the liquor license applications because they had been discovered during the FDIC's search of the office of one of his associates. Tr. 5683. The unlawfulness of this search cannot be doubted.

19/ In performing this search, the FDIC wholly disrupted the operations of the law firm. FDIC officials occupied the entire premises of the law firm and barred the lawyers from working in their offices. 3/9/88 Tr. 105-09.

Whatever the scope of the FDIC's ability to examine a bank's own offices upon becoming receiver, it has no authority to rummage through the offices of an independent entity that happens to be located in space the bank owns. The FDIC as receiver stands in the shoes of the bank. See A. 60. The FDIC therefore has authority to search the bank, but not to search premises that are independent of it. As the government essentially conceded, the offices of Chuang's associates were not bank offices; they were used only for law firm business. 2/26/88 Tr. 92-102. These offices thus were outside of the FDIC's proper dominion, and the government could not lawfully search them in the absence of a warrant.

In response to Chuang's attempt to exclude the liquor license applications, the government argued not that the FDIC search was legal, but that the actual pieces of paper offered into evidence came from the New York State Liquor Authority rather than from Chuang's law offices. Tr. 5684. Although the District Court accepted this argument, it has little force. Long before the government subpoenaed documents from the Liquor Authority, the original indictment alleged that Chuang's wife owned the Chinatown Kite and Second Avenue Restaurants. Tr. 6038-39. The government never satisfied its burden of showing how it knew of Mrs. Chuang's ownership interest at the time of the indictment other than by its review of documents obtained in

the search of Chuang's law offices.[20/] Murray v. United States, 108 S. Ct. 2529, 2534-36 (1988) (government has burden of proving that evidence derived from independent source); Alderman v. United States, 394 U.S. 165 (1969) (same). The government's success, many months after the FDIC search, in securing other copies of the license applications from the Liquor Authority could not remove the taint resulting from the unlawful search. A court may not properly admit evidence acquired as an indirect result of an unconstitutional search. Murray v. United States, 108 S. Ct. at 2533. Thus, the liquor license applications should not have been admitted, and the convictions on counts 19 and 20 must be reversed.

The documents evidencing Chuang's ownership of bank stock, which formed the basis of the government's case on Counts 17 and 18, concededly derived from the FDIC search. The government argued, however, that these documents were admissible because they came from the office of Chuang's secretary rather than from the office of one of Chuang's associates. See 2/26/88 Tr. 92, 100-01. The District Court accepted this contention, ruling that the offices of Chuang and his secretary, unlike the offices of the associates, were mixed-use premises, which were

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20/ After initially conceding that the FDIC had seized copies of the liquor license applications from Chuang's law offices, Tr. 5683-86, the government later contended that no such documents were found in the FDIC search. Tr. 6038. The District Court did not hold a hearing to test the latter contention, and it is rendered inherently suspect by the inability of the government to provide any concrete alternative explanation of how it discovered Mrs. Chuang's ownership interest.

used to conduct the business not only of the law firm but also of the Bank. A. 60. According to the court, "the warrantless search of a law office by a receiver is permissible where the law office is commingled with the business for which the receiver has been appointed." A. 61.

In reaching this conclusion, the District Court relied on the Seventh Circuit's opinion in United States v. Cerri, 753 F.2d 61 (7th Cir.), cert. denied, 472 U.S. 1017 (1985). That opinion, however, supports Chuang's position. In Cerri, the Seventh Circuit upheld a warrantless search of a gun dealer's home, noting that firearms officials have statutory authority to make warrantless searches of the premises of a firearms business and that the dealer in this case used his home as his place of business. Id. at 63. But the Seventh Circuit made clear that the warrantless search was permissible only because prior to initiating the search, the agents knew, or at least had probable cause to believe, that the home also served as a place of business. Id. at 64. In the absence of probable cause to believe that the home was serving a dual function, the court stated, the search would have violated the Constitution. In the court's words, "A man does not, simply by going into business as a gun dealer, so far surrender his privacy that government agents can barge into his home at will on the off chance that he might be storing some of his guns or business records there." Id. at 63. In sum, the authority to conduct a warrantless search of a gun dealer's place of business gave authority to conduct a warrantless search of his home only because the government knew,

or at least had probable cause to believe, at the time of the search that the home was serving as a place of business.

The same reasoning applies here. Chuang did not "simply by going into business as a [bank president] so far surrender his privacy that government agents can barge into his [law office] at will on the off chance that he might be storing some of his [bank] records there." The search of the offices of Chuang and his secretary would comport with constitutional requirements only if the FDIC officials knew or had probable cause to believe at the time of the search that the offices were being used to conduct bank business.[21/] In this case, however, the FDIC had no such knowledge or probable cause.[22/] Lawyers from Chuang and Associates told the FDIC officials as they began

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21/ This conclusion is supported not only by Cerri, but by this Court's opinion in National City Trading Corp. v. United States, 635 F.2d 1020 (2d Cir. 1980). The Court in National City approved the search, pursuant to a warrant, of a law firm that was commingled with a place of business that was the legitimate object of the search. In determining that the search of the law firm comported with the Fourth Amendment, the Court stressed that there was probable cause to believe, at the time the officials applied for a warrant, that the law firm and the business were commingled. Id. at 1025. The Court clearly implied that in the absence of such probable cause, issuance of the warrant and initiation of the search would have been improper. Id. Indeed, the Court stressed that even when probable cause of commingling exists and a magistrate correctly has issued a warrant, a "law office search should be executed with special care." Id. at 1026. The National City decision thus commands close scrutiny of any law office search whose purported basis is that the office is commingled with a business that the government has authority to examine.

22/ The government bore the burden of establishing knowledge or probable cause given that the search was conducted without a warrant. United States v. Arboleda, 633 F.2d 985, 989 (2d Cir. 1980), cert. denied, 450 U.S. 915 (1981).

their search that the entire third floor, including Chuang's own office, was a suite of law offices. 3/9/88 Tr. 172-73. The FDIC agents, by their own admission, had no reason to disbelieve these statements other than that there was access to the firm from the Bank and the telephone lines of the firm and the Bank were connected. Id.; A. 59. Such observations do not constitute probable cause to believe that the suite of law offices, or any single office within the suite, was being used to conduct bank business. Accordingly, the FDIC had no authority to make the search, and the documents taken from the office of Chuang's secretary should not have come into evidence. For this reason, Chuang's conviction on Counts 17 and 18 of the indictment must also be reversed.

III. THE DISTRICT COURT SHOULD HAVE SEVERED THE UNRELATED CAMPAIGN CONTRIBUTION COUNT

The indictment that went to the jury contained 22 counts. Almost all of these counts named both Chuang and Shieh and concerned the non-negotiable certificate program.[23/] Count 21, however, was entirely different -- an alleged conspiracy to cover up the illegal use of bank funds to make campaign

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23/ Counts 2 to 11 alleged that the non-negotiable certificates were falsely omitted from the bank's "call reports"; Counts 12 to 14 concerned alleged false statements about the sale of the non-negotiable certificates and the use of the proceeds; Counts 15 to 20 charged misapplication of bank funds in the use of the proceeds of the non-negotiable certificates and, in one case, bank funds; Count 22 charged that defendants defrauded customers in selling the non-negotiable certificates; and Count 1 was a conspiracy count embracing the substantive crimes described above. Only Court 12 did not name Shieh.

contributions. It was conceded that this count had nothing to do with the non-negotiable certificate program, and that Shieh was not involved in this conspiracy in any way.

Defendants moved to sever Count 21 pursuant to Fed. R. Crim. P. 8(b).[24/] The government admitted that it could "prove the campaign charge without proving any of the other counts," and the District Court noted that joinder of Count 21 "would be no saving in time really, or in jury comprehension." 12/11/87 Tr. 18. The court, however, declined to sever the count on the ground that "the broad charge here is misapplication of bank funds and cover-up of misapplication of bank funds," and that the campaign contribution count "has some connection with . . . a general charge of misapplication of bank funds." A. 44.

The court's ruling was error; the campaign contribution count was misjoined. That the campaign contribution count and the other counts both involved alleged misapplications would establish, at most, that they were "of the same or similar character." Fed. R. Crim. P. 8(a). But Rule 8(b) requires more than a showing that the offenses are similar in nature. United

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24/ Rule 8(b) provides that:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 8(b) governs the propriety of joinder when there are multiple defendants and multiple offenses. United States v. Turoff, 853 F.2d 1037, 1043 (2d Cir. 1988).

States v. Satterfield, 548 F.2d 1341, 1344 (9th Cir. 1977), cert. denied, 459 U.S. 840 (1978). "[D]efendants charged with two separate -- albeit similar -- conspiracies having one common participant are not, without more, properly joined." United States v. Welch, 656 F.2d 1039, 1049 (5th Cir. 1981), cert. denied, 456 U.S. 915 (1982). Rather, the counts must have "common factual elements." United States v. Turoff, 853 F.2d at 1044. To be properly joined, offenses "must be 'unified by some substantial identity of facts or participants,' or 'arise out of a common plan or scheme.'" United States v. Attanasio, 870 F.2d 809, 814-15 (2d Cir. 1989).

There were no such common factual elements in this case. As the government conceded, the campaign contribution charges had nothing to do with the non-negotiable certificate program that was at the root of the other 21 counts. The indictment itself reveals the independence of Count 21; whereas all of the other substantive counts are encompassed within the conspiracy alleged in Count 1, this charge could not be brought within the scope of that conspiracy. Cf. 8 Moore's Federal Practice ¶ 8.06[2], at 8-33 (2d ed. 1989) ("the absence of [a conspiracy charge covering the offenses] places some burden on the government to show a connection between the transactions"). Neither the documentary proof nor the testimonial proof overlapped in any way.[25/] And whereas the defense on the other

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25/ Although certain bank employees testified about both the campaign contribution and the non-negotiable certificate program, the two stories were not factually connected.

charges focused on whether the non-negotiable certificates were bank funds (i.e, deposits), and what the defendants believed in that regard, the funds involved in Count 21 were clearly bank funds. The only "judicial efficiency" served by joinder of the campaign contribution count was to ensure that it was overwhelmed by the mass of evidence relating to the other 21 counts. Accordingly, the conviction on Count 21 should be reversed.[26/]

IV. THE FALSE STATEMENT COUNTS WERE DUPLICITOUS

Duplicity is the charging of more than one crime in a single count. "An indictment is invalidly duplicitous when it joins in a single count two or more distinct, separate offenses." United States v. Droms, 566 F.2d 361, 363 (2d Cir. 1977). Section 1001 of Title 18 of the United States Code, under which 13 counts of the indictment were drawn, provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry [is guilty of a crime].

26/ The propriety of joinder under Rule 8 is subject to "full appellate review" and "where 'joinder should not have been permitted, a conviction must be reversed, unless failure to sever was harmless error.'" United States v. Attanasio, 870 F.2d at 815. Failure to sever is harmless where the evidence would have been admitted at a separate trial. Id. In this case it cannot be contended that the four months of proof on the non-negotiable certificate program would have been admissible at a trial of the campaign contribution count, which would have taken one or two days to try alone. Misjoinder was therefore not harmless.

It is apparent, as this Court long ago held, that the various clauses of §1001 set forth "distinct offenses." United States v. Diogo, 320 F.2d 898, 902 (2d Cir. 1963); accord United States v. Anzalone, 766 F.2d 676, 682-83 (1st Cir. 1985); United States v. Tobon-Builes, 706 F.2d 1092, 1096-97 (11th Cir. 1983). The elements of the three crimes contained within §1001 differ significantly. The "false document" crime requires use of a document, which the other two crimes do not. And the "concealment" crime requires both that the fact concealed be material -- a requirement that does not apply to the false statement or false document crimes, United States v. Elkin, 731 F.2d 1005, 1009 (2d Cir.), cert. denied, 469 U.S. 822 (1984); United States v. Marchisio, 344 F.2d 653, 666 (2d Cir. 1965) -- and that there have been a duty to disclose the fact concealed. United States v. Anzalone, 766 F.2d at 683; United States v. Perlmutter, 656 F. Supp. 782, 789 (S.D.N.Y.), aff'd mem., 835 F.2d 1430 (2d Cir. 1987), cert. denied, 108 S.Ct. 1110 (1988).

Nonetheless, Counts 2 to 14 of the indictment each, in varying ways set forth in the margin, combined in a single count two or more of the separate offenses set forth in §1001, violating the prohibition against duplicity.[27/] Defendants

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27/ Counts 2 to 11, relating to the alleged failure to include the non-negotiable certificates on the call reports, charged that the defendants "did falsify, conceal and cover up, by tricks, schemes and devices, a material fact and make false, fictitious and fraudulent statements and representations." A. 24-25 (emphasis supplied). Count 12 charged that Chuang "made false and fraudulent statements and representations . . . and further . . . used a false writing and document (continued...)

objected to the duplicity and moved to dismiss the §1001 counts prior to trial. The court denied this motion. A. 54. Before the case was submitted to the jury, defendants again raised the duplicity issue, asking that the government be required to elect which crime of the several set forth in §1001 it would have the jury determine. A. 103. The court did not require such an election, and indeed charged the jury on all three of the crimes set forth in §1001, relying on the government's argument that the jury might find that the defendants had violated §1001 in one way and not in another. A. 97-100, 180-91.

This error requires reversal of the convictions on the §1001 counts. Because the various clauses of §1001 set forth "distinct offenses," United States v. Diogo, 320 F.2d at 902, they cannot be combined in single counts.[28/] And the error is

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[27/] (...continued)
knowing the same to contain a false, fictitious and fraudulent statement and entry." A. 28 (emphasis supplied). Count 13 charged that the defendants "made false statements, made and used false and misleading writings and documents, and used schemes, tricks and devices to cover up and conceal material facts." Id. (emphasis supplied). And Count 14 charged that the defendants "used a false writing and document knowing the same to contain false, fictitious and fraudulent statements and entries, and covered up and concealed by trick, scheme and device a material fact." A. 29 (emphasis supplied).

[28/] The error is even more egregious with respect to Count 12, which alleges not only multiple clauses of §1001 but also multiple statements. Count 12 charges both that Chuang

> falsely and fraudulently stated to OCC bank examiners that Golden Pacific was not involved in financing Sandpebble's construction of Golden Pacific headquarters and that its financing had been obtained from Taiwanese investors . . .

(continued...)

not "an exercise in mere formalism," but affected Chuang's substantive rights. See United States v. Margiotta, 646 F.2d 729, 732-33 (2d Cir. 1981); United States v. Murray, 618 F.2d 892, 897 (2d Cir. 1980).

First, the lack of precision in the indictment deprived Chuang of fair notice of exactly what violations would be proved against him. Indeed, the District Court noted early in the trial that "the government's -- the theories of this case are constantly evolving, and being refined." Tr. 1055. "The prohibition against duplicity . . . protects a defendant's right . . . to notice of the 'nature of cause of the accusation' against him so that he may prepare his defense." 8 Moore's Federal Practice ¶ 8.03[1] (2d ed. 1989), at 8-6.

Moreover, the duplicitous nature of the count may well have deprived Chuang of a unanimous verdict. The court did not instruct the jury that it had to be unanimous as to the particular aspect of §1001 which Chuang violated, as required by cases such as United States v. Gipson, 553 F.2d 453 (5th Cir. 1977) and United States v. Natelli, 527 F.2d 311 (2d Cir. 1975), cert. denied, 425 U.S. 934 (1976). There is thus the distinct possibility that because of the duplicitous indictment the jury's

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28/ (...continued)
and also that Chuang:

> used a false writing and document knowing the same to contain a false, fictitious and fraudulent statement and entry, to wit, the defendant CHUANG provided to the OCC a copy of a lease agreement between Sandpebble and Golden Pacific that falsely stated that Golden Pacific was not providing any financing for the construction of the building.

apparently unanimous verdict that Chuang violated §1001 concealed fundamental differences among the jurors as to what he actually did that constituted the violation.[29/] Accordingly, the convictions on the false statement counts should be vacated.

V. THE GOVERNMENT FAILED TO PLEAD OR PROVE MISAPPLICATION

Counts 15, 16, and 19 alleged that the defendants willfully misapplied Bank funds, in violation of 18 U.S.C. §656. These charges were based upon certain alleged uses of funds from the sale of non-negotiable certificates. The convictions on those counts, however, cannot stand because the government failed to allege and prove all of the elements of misapplication.

Section 656 provides, in relevant part, that

> [w]hoever, being an officer, director, agent or employee of, or connected in any capacity with any . . . national bank . . . , willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, [or] employee . . . shall be [subject to fines and/or imprisonment].

The words "willfully misapplies" have acquired a definitive meaning through judicial construction. Thus, the Supreme Court held that willful misapplication is the conversion of bank funds:

> We think the wilful misapplication made an offence by this statute means a misapplication for the use, benefit, or gain of the party charged, or of some company or person other than the [national banking] association. Therefore, to constitute the

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29/ The inability to know the basis of the jury's decision also weakens the defendant's protection against double jeopardy in the event of a subsequent prosecution.

> offense of wilful misapplication, there must be a conversion to his own use or the use of some one else of the moneys and funds of the association by the party charged.

United States v. Britton, 107 U.S. 655, 666-67 (1883).[30/] In addition, willful misapplication under 18 U.S.C. §656 requires that the defendant intend to injure or defraud the bank. United States v. Docherty, 468 F.2d 989, 994-95 (2d Cir. 1972). As this Court held in United States v. Clark, 765 F.2d 297, 303 (2d Cir. 1985), the purpose of §656 was to protect the bank against economic injury, and conduct will not amount to misapplication unless it involves some risk of pecuniary loss to the bank. Accord Batchelor v. United States, 156 U.S. 426, 431 (1895) (no misapplication where bank officer substituted worthless notes for the similarly worthless notes of an insolvent debtor, because the conduct did not expose the bank to any additional risk of loss).

Review of Counts 15, 16 and 19 shows that the essential elements of a violation of §656 were not present here, even viewing the facts in the light most favorable to the government. In each case, the challenged transaction involved neither any conversion of bank funds nor any risk of loss to the Bank. Count 15 alleges that the Bank made loans to three Taiwanese companies, including Everyone's International Corp.; that Everyone's International went bankrupt; and that the defendants misapplied approximately $1 million of non-negotiable certificate funds by

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30/ The Court in Britton held that the use of bank funds by a bank president to purchase bank stock, which he held in trust for the bank's use, may have been unlawful, but was not willful misapplication, because the funds were not converted to someone else's benefit. 107 U.S. at 666-67.

using them to repay Everyone's International's debt to the Bank. A. 30-31. Similarly, Count 16 alleges that the Bank made a $600,000 loan to Morrison Express Company (USA), the proceeds of which were transferred from the account of Morrison Express to the account of Everyone's International; and that the defendants subsequently misapplied approximately $600,000 in non-negotiable certificate funds by using them to repay the Bank's original loan to Morrison Express. A. 32-33. Finally, Count 19 alleges that Chinatown Kite Restaurant, Inc., which allegedly was owned by Chuang and his wife, had overdrafts in its account at the Bank, and that defendants misapplied bank funds by using non-negotiable certificate funds to cover the overdrafts. A. 36-37.

In each instance, the Bank had extended credit to a customer -- Everyone's International, Morrison Express, and Chinatown Kite.[31/] But these original extensions of credit were not the basis for the misapplication charges. The government's theory was instead that the original loans were uncollectible or contrary to bank policy,[32/] and that Chuang attempted to conceal the problems with those loans from the OCC and the Bank's Board of Directors by transferring the loans from the original loan or checking accounts (which were accessible to the OCC and the

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31/ An overdraft is form of credit extended by a bank to the account holder. See 12 C.F.R. §215.3(a)(2).

32/ The government contended that the original loans to Everyone's International and Morrison Express were "either not going to get paid off at all, or are not going to get paid off in full, or are not going to get paid off any time soon." A. 125. The government asserted that the Chinatown Kite overdrafts lacked Board of Directors approval and exceeded the Bank's overdraft limit. A. 132-33.

Board) to the non-negotiable certificate program, which was accounted for separately. See A. 30-33, 36-37, 125-33.

The transactions charged, however, neither converted funds of the Bank nor caused the Bank any additional risk of loss. The government's overall theory, it must be recalled, was that the non-negotiable certificates were deposits, and that the proceeds were assets of the Bank. Thus, when the original loans were repaid or replaced with loans from the non-negotiable certificate funds, the debts were merely switched from one account of the Bank to another. The amount of the debts and the Bank's ability to collect on those debts remained the same. The transactions were thus not misapplications.

United States v. Michael, 456 F.Supp. 335 (D.N.J. 1978), aff'd mem., 605 F.2d 1198 (3d Cir. 1979), is directly on point. There, a bank officer attempted to cover up fraudulent loans by granting new loans, the proceeds of which were used to pay off the original fraudulent loans. The court held that this was not willful misapplication because the later loans did not cause the bank to lose any further control over its assets. Id. at 342.[33/] As in this case, the bank was not exposed to any additional risk of pecuniary loss as a result of the conduct charged -- making the subsequent loans.

33/ The court in Michael relied in part upon Coffin v. United States, 162 U.S. 664, 677 (1896), in which the Supreme Court held that "[i]f the money of a bank be misapplied by paying it out on worthless paper, it is obvious that a subsequent renewal of such paper upon which nothing was actually obtained could not have misapplied the money of the bank."

The government contended in this case, however, that the charged transactions constituted misapplications because, by moving the loans off the Bank's regular books and into the non-negotiable certificate program, defendants made it more difficult for the Bank's management and the OCC to learn of problems with the loans. A. 125-26, 133. But the government's argument would establish no more than record-keeping violations, punishable, if at all, under other statutes. The likelihood of loss to the Bank was affected not one whit by the particular account at which the Bank was owed money.[34/] Accordingly, Chuang's convictions on Counts 15, 16, and 19 must be reversed.

VI. THE GOVERNMENT'S EVIDENCE WAS LEGALLY INSUFFICIENT TO ESTABLISH WIRE FRAUD

The final count of the indictment charged Chuang with having committed wire fraud, in violation of 18 U.S.C. §1343, by engaging in a scheme to defraud bank customers. But the proof offered in support of this charge was legally insufficient to establish wire fraud. The government's own view of Chuang's

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34/ Indeed, the court in Michael rejected this same argument:

> Each substitute loan . . . allegedly tended to postpone discovery of a prior fraudulent transaction but it is not a new misapplication because the bank has lost no further degree of control over its assets. The concealment of a prior misapplication may be proof of guilty knowledge with respect to the prior crime, but concealment does not give rise to criminal liability for a second misapplication equivalent to the first unless the transaction causes the bank to lose control over additional funds.

456 F.Supp. at 342.

scheme and the intent underlying it cannot sustain a wire fraud conviction under either this Court's decision in United States v. Starr, 816 F.2d 94 (2d Cir. 1987), or the Supreme Court's decision in McNally v. United States, 483 U.S. 350 (1987).[35/]

The evidence demonstrated that Chuang fully intended that each purchaser of a non-negotiable certificate receive his money back, with accrued interest, when the certificate became due. The government itself conceded this fact; in summing up, the prosecutor stated: "I am sure [the defendants] hoped that all of these investments [made with non-negotiable certificate proceeds] were going to be good. And they were going to make money. And they were going to repay all the customers, and give the customers the interest rates that the customers were promised." Tr. 8372. Indeed, until the OCC closed the bank, each purchaser of a non-negotiable certificate did receive full payment, including interest, when his certificate matured, in exact accordance with the certificate's terms. Tr. 2744-45. The government thus did not even attempt to prove that Chuang intended to deprive bank customers of their monies. Tr. 8372.

The government's theory appears to have been that Chuang violated the wire fraud statute by depriving bank customers of information respecting the use that the Bank would

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35/ The District Court itself recognized that the government's theory of wire fraud was problematic in light of these two cases. Although the District Court decided to send the wire fraud count to the jury, the Court conceded to defense counsel that "[y]ou may ultimately be right on the law here," Tr. 6736, and stated that "the Court of Appeals can decide that question." Tr. 6779.

make of their monies during the time the certificates matured. As the government argued in summation, the essence of the alleged fraud was to "tell [customers] you're doing one thing with [money and to] do something else with it." Tr. 8371. Under this theory, Chuang's conceded intent to give bank customers exactly what he had promised them -- a return of their monies plus interest on the agreed-upon date -- became irrelevant; according to the government, Chuang committed wire fraud by withholding from bank customers accurate information as to what the Bank would do with the funds while they were in the Bank's possession.

This theory of wire fraud is remarkably similar to the one rejected by this Court in United States v. Starr, supra. The defendants in Starr offered to provide a service to their customers for a fee and provided that service exactly as promised; the defendants, however, used the fees collected from their customers for a purpose different from that which the customers had contemplated. 816 F.2d at 96. This Court held that although the defendants had deceived their customers, they had not committed wire fraud: "the deceit must be coupled with a contemplated harm to the victim [and] the harm contemplated must affect the very nature of the bargain itself." Id. at 98. In response to the government's argument that the defendants had harmed their customers by defeating the customers' expectations as to what would be done with the fees, the court stated:

> Although it may be assumed that the use to which the money would be put, and the concomitant expectation that it would be used for a specific purpose, implicitly constituted a part of the bargain between the

> parties, that defeated expectation alone would not affect the nature or quality of the services that was the basis of the customers' bargain . . . . Nor does the government's argument explain how the [defendants] intended the misappropriation [of funds] to cause direct pecuniary harm to their alleged victims . . . . Therefore, any "harm" intended by the [defendants] is, at most, metaphysical and certainly not of the character . . . sufficient to infer fraudulent intent.

Id. at 100 (emphasis in original). The Court concluded "'that the defendants intended to deceive their customers but they did not intend to defraud them.'" Id. at 101 (quoting United States v. Regent Office Supply Co., 421 F.2d 1174, 1182 (2d Cir. 1970)).

Precisely the same reasoning applies to this case. Even if Chuang intended to deceive his customers as to the use he would make of their monies, he never intended -- as the government conceded -- to cause his customers any pecuniary harm. Tr. 8372. Chuang intended that his customers receive the exact benefit for which they had bargained -- the return of the face value of their certificates plus accrued interest. Id. And, indeed, Chuang made good on this intent until the very day the Bank was closed. Tr. 2744-45. In these circumstances, this Court might find that Chuang intended to deceive his customers, but cannot find that he intended to defraud them. As in Starr, "the jury's verdict, unsupported by evidence of contemplated injury, must fall." 816 F.2d at 100.

This result is mandated not only by this Court's decision in Starr, but also by the Supreme Court's decision in McNally v. United States, supra. The Supreme Court held in

McNally that the mail and wire fraud statutes are "limited in scope to the protection of property rights," and do not reach schemes to deprive people of non-proprietary "intangible rights." 483 U.S. at 360, 356; accord Carpenter v. United States, 484 U.S. 19, 23 (1987). The government in this case failed to prove that Chuang intended to deprive any bank customer of his property, as required by McNally. The government's evidence, as noted above, showed at most that Chuang intended to deprive bank customers of information respecting the use to be made of their monies during the time their certificates matured. This intent is insufficient to support a wire fraud conviction under McNally. The right to the kind of information at issue here is wholly intangible and non-proprietary. Cf. United States v. Corvino, 837 F.2d 65, 70-72 (2d Cir. 1987) (employee's concealment from his employer of material information respecting the employee's activities could not support a wire fraud conviction because employer's interest in the information was non-proprietary). McNally makes clear that the wire fraud statute does not extend to schemes to deprive persons of such a right. Chuang's wire fraud conviction therefore must be reversed.[36/]

36/ Moreover, the District Court's decision to retain the wire fraud count in the indictment and allow the government to offer proof on this count tainted the rest of Chuang's convictions. This decision enabled the government to place on the witness stand numerous bank customers who claimed that the Bank had deceived them. This testimony was a powerful and damaging portion of the government's evidence. The case would have had a wholly different tenor had the government been limited to attempting to show that Chuang made false statements to regulatory officials and used certain monies in a way that placed the Bank at risk.

(continued...)

VII. THE DISTRICT COURT IMPROPERLY ADMITTED HEARSAY EVIDENCE

A cornerstone of the government's contention that the non-negotiable certificate program was fraudulent was its version of the events at a meeting between representatives of the Bank and of the FRB, at which the FRB approved the program. The government characterized this meeting as a "key event" in the history of the program and alleged that the FRB's approval of the program was based upon misrepresentations made by Chuang at the meeting. A. 105-24. But the government's proof of these alleged misrepresentations was inadmissible hearsay.

As prosecution conceded in summation, "nobody could remember exactly what happened at that meeting." A. 106. To fill this gap, the government relied upon a memorandum subsequently prepared by Joyce Motylewski, an FRB attorney who attended the meeting. A. 254. Motylewski, like the other government witnesses, did "not have any independent recollection of the meeting." A. 69. Although the memorandum bore her signature, she had no recollection of when she prepared it or whether she read it before she signed it. A. 69-70. She further could not say whether the memorandum reported only what occurred at the meeting, or statements made to her outside of the meeting by other government personnel. A. 77-80. Finally, when asked whether the memorandum accurately recorded her recollection at

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36/ (...continued)
Accordingly, reversal of the wire fraud count will require a reversal on all counts.

the time, Motylewski could say no more than that she "would not have put [the memorandum] into final form unless [she] believed at the time that it was accurate." A. 74.

Nevertheless, the District Court, over defendant's objection, permitted the memorandum to be read to the jury as "past recollection recorded" under Fed. R. Evid. 803(5).[37/] But the foundation established by the government was deficient. First, Motylewski could not testify that she knew her memorandum was accurate when made but only that she assumed it was based upon her signature. See United States v. Felix-Jerez, 667 F.2d 1297, 1301 (9th Cir. 1982), quoting Vicksburg & Meridian R.R. v. O'Brien, 119 U.S. 99, 102 (1886) (document admissible when witness testifies, inter alia, "that he knows it was correct when prepared" (emphasis added)). More important, certain statements in the document -- including a critical alleged misrepresentation that the Bank operated the non-negotiable certificate program through a trust department -- could not be attributed to either defendant, since the witness admitted that her memorandum was based in part upon information received from government officials outside of the meeting, and nothing on the face of the memorandum indicated that this information came from the meeting. A. 77-

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37/ Rule 803(5) provides an exception to the hearsay rule for

> [a] memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge accurately.

79. 85-87.[38] But to the extent that the memorandum could not be shown to reflect statements made by Chuang or in his presence, it was inadmissible hearsay. As the First Circuit held in Ricciardi v. Children's Hosp. Medical Center, 811 F.2d 18, 23 (1st Cir. 1987), "[i]f the recorder wrote down hearsay, the hearsay itself must come within an exception to be admissible. This cannot be established if the source is unknown" (citation omitted). Accord Meder v. Everest & Jennings, Inc., 637 F.2d 1182, 1186 (8th Cir. 1981).[39]

The error was not harmless. The prosecutors discussed the meeting extensively in both the opening and the rebuttal summations, arguing that it was a "key event" in the alleged fraud. A. 105-24, 145-55. The heart of the defense was Chuang's contention that he believed the program was proper because the FRB and OCC had approved it. Tr. 8031, 8074-75. The government countered by claiming that the FRB had granted approval solely because of Chuang's alleged misrepresentations. A. 107, 115-16. But the only proof that Chuang made misrepresentations to the FRB was Motylewski's memorandum. Without that erroneously admitted evidence, Chuang might well have been acquitted.

38/ Indeed, an attorney for the Bank who was present at the meeting testified that no such statement was made, and that he would have corrected any such statement. Tr. 2063.

39/ The District Court in this case had earlier shown some confusion over the applicability of Rule 803(5) in a multiple hearsay situation. Tr. 1197-98.

VIII. THE COURT'S INSTRUCTIONS PRECLUDED A FAIR CONSIDERATION BY THE JURY OF WHETHER THE NON-NEGOTIABLE CERTIFICATES WERE DEPOSITS

Counts 2 to 11 charged the defendants with fraudulently failing to include non-negotiable certificate funds as deposits on the call reports submitted to the OCC. Count 1 charged the defendants with conspiring to defraud the United States by, in part, concealing the nature of these funds from the government. The critical disputed issue with respect to these counts was whether the non-negotiable certificate funds were deposits.[40/] But the District Court's charge to the jury on this issue substantially lessened the government's burden of proof.

The government must prove the essential facts of a crime charged beyond a reasonable doubt, and a court's charge to the jury may not establish a presumption that relieves the prosecution of that burden. Francis v. Franklin, 471 U.S. 307 (1985); Sandstrom v. Montana, 442 U.S. 510 (1979); Morissette v. United States, 342 U.S. 246, 275 (1952). But the District Court's charge in this case relieved the prosecution of its burden of proving beyond a reasonable doubt the threshold fact that the non-negotiable certificate funds were deposits. The District Court instructed the jury that "[o]rdinarily, monies given to a bank by a customer are deposits," although "[a]

40/ The defendants did not dispute that all deposits must be reported in the call reports, but took the position that the non-negotiable certificate funds were custodial account funds, rather than deposits. The government conceded that if the monies were custodial account funds, they need not be included in the call reports. Tr. 7578.

different relationship may be created by oral or written agreement." A. 178. The natural, indeed almost inescapable, understanding of the court's instruction would be that the non-negotiable certificate funds were deposits unless the defense proved otherwise and that the funds were thus required to be included in the call reports. In this manner, the court's instruction placed an unconstitutional burden of persuasion upon the defendant and violated the requirement that the prosecution prove beyond a reasonable doubt every fact necessary to establish the crime charged. See In re Winship, 397 U.S. 358, 364 (1970).

This error was compounded by a second erroneous instruction by the court "correcting" a statement by defense counsel. The government had argued that the jury could infer that the non-negotiable certificate program was fraudulent from Chuang's failure to involve the Board of Directors in the loans made with the funds. Tr. 7883-84. Counsel for Chuang responded to the jury as follows:

> The custodial account loans did not require board of director approval. . . .
>
> Look at the policy, look at all the evidence, you will not see anything in there that said every time a custodial loan had to be made board of director approval was necessary. . . .

A. 143. After the government objected, the court, over defense objections, charged the jury, in part, as follows:

> You must accept the law as I give it to you. If any attorney has stated a legal principle different from one that I state to you in my instructions, it is my instruction that you must follow.

> In this connection I should like to correct an erroneous statement that was made during closing argument.
>
> I advise you that as a matter of law, the board of directors of the Golden Pacific National Bank was required to be involved in the supervision of the custodial program.

A. 157-58.

Since it was not disputed that the Bank's board of directors had not been involved in the non-negotiable certificate program, the court in effect instructed the jury to find that the non-negotiable certificate funds were not part of a valid custodial program. However, whether or not the custodial program, or bank policies with respect to that program, complied with regulatory requirements is not determinative of the parties' intent in entering into a banking relationship, and so does not determine whether those funds are deposits. The parties might have intended to enter into a custodial arrangement, even if the custodial program failed to comply fully with all regulatory requirements. The corrective instruction, combined with the presumption that all monies received by a bank are deposits, substantially foreclosed the jury from making a determination consistent with that theory, namely that the non-negotiable certificate program was a custodial program and that the non-negotiable certificate funds were something other than deposits. The instruction thus violated Chuang's rights under the Due Process Clause and deprived him of a fair trial.[41/]

41/ The corrective instruction also affected other charges. It affected the misapplication charges by inducing the jury to (continued...)

IX. CHUANG'S SENTENCE WAS ILLEGALLY IMPOSED

The District Court sentenced Chuang to five years' incarceration on each count on which he was convicted, with all terms to run concurrently. In addition, the court ordered restitution of $200,000 "to pay interest to [Non-Negotiable] Certificate customers of the former Golden Pacific National Bank whose deposits exceeded the FDIC-insured amount of $100,000.00."[42/] A. 252. This sentence is invalid because the court failed to comply with the requirements of Federal Rule of Criminal Procedure 32(c)(3)(D) in responding to Chuang's objections to the presentence report. Moreover, the District Court lacked any factual basis to order restitution.

Under Rule 32(c)(3)(D), if a defendant or his counsel alleges a factual inaccuracy in a presentence report, the District Court must make "(i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because

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41/ (...continued)
find that the defendants' failure to obtain Board approval of loans of custodial funds violated bank policy and concealed the transactions from the Board. The instruction was especially devastating in combination with the court's charge that "evidence that a defendant knowingly participated in . . . efforts to conceal his or her transactions, would ordinarily indicate an intent to injure or defraud the bank." Tr. 8441. Further, because these issues were central to the case as a whole, the court's instructions should lead to a new trial on all counts. See Washington v. Harris, 650 F.2d 447, 453 (2d Cir. 1981), cert. denied, 455 U.S. 951 (1982).

42/ The court also directed Chuang to make restitution to the FDIC by complying fully with all of the terms of the settlement agreement entered into between the FDIC and Bancorp, the Bank's holding company. A. 252. Chuang does not challenge this portion of the sentence.

the matter controverted will not be taken into account in sentencing." Rule 32 is intended to ensure the accuracy of presentence reports and to minimize the possibility that a defendant will be sentenced on the basis of erroneous information. United States v. Weichert, 836 F.2d 769 (2d Cir. 1988). In light of these important purposes, error of any kind in handling claims of inaccuracy in a presentence report "must not be taken lightly." United States v. Ursillo, 786 F.2d 66, 71 (2d Cir. 1986); see United States v. Bradley, 812 F.2d 774, 782 (2d Cir.) (noting the "mandatory character" of Rule 32), cert. denied, 484 U.S. 832 (1987).

Chuang's counsel raised two objections to the presentence report. First, counsel alleged inaccuracy in the report's victim impact statement, which concluded that Chuang's actions had resulted in substantial loss to the FDIC. Chuang's counsel explained that "it is our view that there is no existing financial victim of the offense." A. 249. In response to this objection and counsel's subsequent request that the court find the victim impact statement inaccurate, the court stated: "You can ask that this portion of the minutes be transcribed and accompany the presentence report. I do so direct." A. 250. Second, counsel objected to statements in the presentence report that Chuang's actions were motivated by greed. A. 250-51. In response to this objection, the court stated: "I don't see anything clearly erroneous here." A. 251.

The court's responses to defense counsel's allegations of factual inaccuracies in the presentence report did not comply

with the requirements of Rule 32(c)(3)(D). The court plainly did not make any finding as to the accuracy of the victim impact statement in the report. Nor did the court state that it would not rely on the victim impact statement at sentencing. With respect to this claim of inaccuracy, the court wholly ignored the mandate of Rule 32.

Neither did the court respond appropriately to counsel's allegation that the report erred in stating that Chuang was motivated by personal greed. With respect to that allegation, the court stated that the presentence report's conclusion was not "clearly erroneous." But this Court has held that a court may find that a challenged statement in a presentence report is accurate only if the statement is supported by a preponderance of the evidence. United States v. Lee, 818 F.2d 1052, 1056-57 (2d Cir.), cert. denied, 484 U.S. 956 (1987). Because the District Court used an inappropriately deferential standard to judge the accuracy of the presentence report, the court's "finding" with respect to the report's conclusion that Chuang was motivated by greed is deficient under Rule 32.

The District Court's plain procedural errors take on added significance when the substance of defense counsel's allegations is considered. The FDIC's own balance sheet established that Chuang's actions were in no way responsible for any loss suffered by any supposed "victim" of his crime. According to this balance sheet, as of January 31, 1989, the total liabilities of the Bank were approximately $170 million, whereas the total recoveries from bank assets were approximately

$180 million. A. 266. These figures demonstrate that had the Bank remained open, no customer would have suffered any loss, because the Bank's assets exceeded its liabilities, and the Bank was therefore solvent. The losses reported by the FDIC following the Bank's closure resulted solely from the administrative expenses associated with the closure. Id. Chuang can hardly be held accountable for these losses given that they resulted from the government's own mistaken decision that the Bank had liabilities in excess of assets and was therefore insolvent. Thus, the presentence report's conclusion that Chuang's greed resulted in pecuniary loss to others was fundamental error.

For these reasons, this Court not only should remand for a new sentencing, but also should direct the District Court that any order of restitution would be inappropriate. An order of restitution is proper only when the defendant's actions have caused some loss. 18 U.S.C. §§3663-64; United States v. Weichert, 836 F.2d at 772. In this case, there was no proof that Chuang's actions caused any loss. Given this absence of proof, a restitution award is improper.

CONCLUSION

The judgment of conviction should be reversed and the indictment dismissed or the case remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief were hand delivered this 6th day of November, 1989, to:

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