

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

FILED
U.S. DISTRICT COURT

91 JUL 12 AM 9:55

SON
G. I.
JONES

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 JOHN DAVID TOWERY,)
)
 Defendant.)

NO. EV 91-2 / -CR

I N F O R M A T I O N

The United States Attorney charges that:

AT ALL TIMES PERTINENT HERETO:

1. GE Plastics Manufacturing Division, Mount Vernon Plant Site (hereinafter "GE Plastics"), was a complex of manufacturing and warehouse facilities owned by the General Electric Company, a New York corporation duly licensed and qualified to do business in the State of Indiana, and engaged in the manufacture of plastic materials and resins. GE Plastics was located near Old State Road 69, immediately southwest of the City of Mount Vernon, Posey County, Indiana.

2. Located directly to the south of, and immediately adjacent to, the intersection of New Highway 69 and County Road 850S, on property owned by the General Electric Company, there existed a prominent upland knob or ridge. This knob or ridge (hereinafter referred to as "the GE Site") contained, under the

surface of the ground, an archaeological resource, specifically, a Hopewell Indian ceremonial site dating from the Middle Woodland Period of the Hopewell civilization, a period corresponding approximately to the first centuries A.D. The GE Site contained within it thousands of artifacts of the Hopewell civilization, including but not limited to flint tools, pottery, chert projectile points, quartz crystal blades, obsidian blades, carved cannel coal, mica, copper axe-heads or "celts," shell beads, freshwater pearls, animal bone, portions of human mandibles, drilled bear teeth, items of wood and leather, or fragments of each of the foregoing categories of artifacts.

3. Indiana law, at Indiana Code Section 35-43-2-2, provided that "[a] person who . . . [k]nowingly or intentionally interferes with the possession or use of the property of another person without the person's consent . . . commits criminal trespass."

4. Indiana law, at Indiana Code Section 35-43-4-3, further provided that "[a] person who knowingly or intentionally exerts unauthorized control over property of another commits criminal conversion." A person's control over property of another was "unauthorized" under Indiana law if it was exerted, among other means, "[w]ithout the other person's consent," or

"[i]n a manner or to an extent other than that to which the other person has consented."

5. Boyd Brothers, Incorporated (hereinafter "Boyd Brothers"), of Sesser, Illinois, was an earth-moving contractor that had been awarded contracts in conjunction with the construction of a new county road (to be known as County Road 850S) in the vicinity of the GE Plastics Plant near Mount Vernon, Indiana. Specifically, Boyd Brothers had contracted to haul "borrow" dirt from the flanks of the upland knob or ridge (the GE Site) for use as fill during road construction, and to provide grading and reclamation of General Electric lands adjacent to the road construction project.

6. John William Way, known as "Bill" Way, was employed by Boyd Brothers as a heavy equipment operator, and performed duties on property owned by the General Electric Company at the location of the "borrow" areas adjacent to the county road construction project described herein.

7. Danny Gene Glover was a resident of the State of Kentucky, and a long-time acquaintance of the Defendant, JOHN DAVID TOWERY.

8. Arthur Joseph Gerber was a resident of Tell City, in the State of Indiana, and a long-time acquaintance of the Defendant, JOHN DAVID TOWERY.

9. JOHN DAVID TOWERY, the Defendant herein, was a resident of Panther, in the State of Kentucky.

THE UNITED STATES ATTORNEY FURTHER CHARGES THAT:

10. Beginning on or about July 24, 1988, and continuing until on or about the 7th day of August, 1988, JOHN DAVID TOWERY excavated and removed, and aided the excavation and removal from the GE Site of numerous Hopewell Indian artifacts which had been buried under the surface of the ground, as more fully set forth hereinafter. The artifacts so removed and excavated included approximately seven (7) copper axeheads (known as "celts"); fourteen (14) drilled bear teeth; twenty-six (26) pearl beads; nine (9) copper spools adorned with silver; two (2) copper pins; one (1) copper plate; three (3) rounded half-spheres made of silver; numerous fragments of copper; and numerous pieces of carved flint and chert points.

11. Thereafter, JOHN DAVID TOWERY, the Defendant herein, transported and sold, and aided the transportation and sale, in interstate commerce, of the foregoing archaeological resources, as more fully set forth hereinafter.

THE EXCAVATION, REMOVAL, TRANSPORTATION AND SALE OF THE
ARCHAEOLOGICAL RESOURCES LISTED ABOVE WAS ACCOMPLISHED, IN
SUBSTANCE, AS FOLLOWS:

12. On or about June 3, 1988, John William Way, known as "Bill" Way, while operating a bulldozer on property of the General Electric Company adjacent to the county road construction project near Mount Vernon, Indiana, uncovered hundreds of prehistoric Indian artifacts from the Hopewell period under the surface of the ground.

13. Neither John William Way, nor any other agent or employee of Boyd Brothers, Inc., notified proper authorities of the discovery of a concentration of archaeological materials, as required by the Standard Specifications of the Indiana Department of Highways, and by the archaeological survey and permission to proceed with borrow operations that had been granted to Boyd Brothers.

14. On or about June 3, 1988, and again on June 4, 1988, John William Way excavated and removed numerous prehistoric Indian artifacts from the GE Site, and transported them to his residence in the State of Illinois.

15. On or about July 21, 1988, John William Way sold most of the artifacts he had removed from the GE Site to Arthur Joseph Gerber for the sum of six thousand dollars (\$6,000) paid

in United States Currency. As a part of this transaction, and as further consideration for the receipt of the six thousand dollars (\$6,000) in currency, John William Way agreed to guide Arthur Joseph Gerber to the location of the GE Site.

16. On or about July 22, 1988, and July 23, 1988, Arthur Joseph Gerber contacted JOHN DAVID TOWERY, informed him of the existence of the GE Site, and requested that he accompany Arthur Joseph Gerber to the GE Site in order to excavate and remove prehistoric Indian artifacts therefrom.

17. On or about July 24, 1988, JOHN DAVID TOWERY and Danny Gene Glover accompanied John William Way and Arthur Joseph Gerber to the GE Site, where John William Way designated the location where he believed that the greatest concentration of prehistoric Indian artifacts would be found.

18. On or about July 24, 1988, JOHN DAVID TOWERY, Danny Gene Glover, and Arthur Joseph Gerber excavated and removed archaeological resources at the GE Site, including drilled bear canines, pearl beads, copper fragments, and flint or chert objects known as "cache blades."

19. On or about July 24, 1988, JOHN DAVID TOWERY, Danny Gene Glover, and Arthur Joseph Gerber valued the archaeological resources they had excavated and removed, and made a division of

the archaeological resources based on that valuation.

Thereafter, JOHN DAVID TOWERY transported a quantity of the said archaeological resources from the State of Indiana to the State of Kentucky.

20. On or about July 27, 1988, JOHN DAVID TOWERY and Arthur Joseph Gerber, together with another person known to the United States Attorney, returned to the GE Site and excavated and removed archaeological resources, including flint and chert cache blades, fragments of pearl beads and of copper. Thereafter, JOHN DAVID TOWERY transported a quantity of the said archaeological resources from the State of Indiana to the State of Kentucky.

21. On or about July 31, 1988, JOHN DAVID TOWERY, Danny Gene Glover, and Arthur Joseph Gerber returned to the GE Site and excavated and removed archaeological resources, including flint and chert cache blades, copper pins, copper spools adorned with silver, a copper plate, drilled bear canines, seven copper axe-heads (known as "celts"), rounded half-spherical objects made of silver, and pearl beads.

22. On or about July 31, 1988, JOHN DAVID TOWERY, Danny Gene Glover, and Arthur Joseph Gerber valued the archaeological resources they had excavated and removed at the GE Site on that date, and made a division of the archaeological resources based on that valuation. Thereafter, JOHN DAVID TOWERY transported a

quantity of the said archaeological resources from the State of Indiana to the State of Kentucky.

23. On or about August 6, 1988, and August 7, 1988, at Owensboro, in the State of Kentucky, JOHN DAVID TOWERY and Danny Gene Glover sold the flint and chert cache blades previously removed from the GE Site to a number of individuals presently unknown to the United States Attorney, for sums of United States Currency. JOHN DAVID TOWERY and Danny Gene Glover then divided the currency proceeds of the said sales with Arthur Joseph Gerber.

24. Arthur Joseph Gerber thereafter purchased from JOHN DAVID TOWERY, in the State of Kentucky, the remainder of the archaeological resources previously jointly removed from the GE Site by JOHN DAVID TOWERY, Danny Gene Glover and Arthur Joseph Gerber, for a sum of United States Currency in addition to an in-kind exchange of certain unrelated artifacts previously belonging to Arthur Joseph Gerber.

25. The excavation, removal and transportation of the foregoing archaeological resources constituted criminal trespass in violation of Indiana Code, Section 35-43-2-2(4), in that beginning on or about July 24, 1988, and continuing until on or about July 31, 1988, in the County of Posey, State of Indiana, JOHN DAVID TOWERY, the Defendant herein, did knowingly or

intentionally interfere with the possession and use of the property of another person, specifically, that piece of real property located on a ridge immediately south of County Road 850S near Mount Vernon, Indiana, herein referred to as the GE Site, being the property of the General Electric Company, by removing items of property from under the surface of the ground, and taking and carrying away such items of property without the consent of the General Electric Company, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana.

26. Further, the excavation, removal and transportation of the said archaeological resources constituted criminal conversion, in violation of Indiana Code, Section 35-43-4-3, in that beginning on or about July 24, 1988, and continuing until on or about July 31, 1988, in the County of Posey, State of Indiana, JOHN DAVID TOWERY, the Defendant herein, did knowingly exert unauthorized control over property, to-wit: numerous Indian artifacts of historic and economic value; of another person, to-wit: the General Electric Company; by obtaining, taking and carrying away the foregoing property in a manner and to an extent other than that to which the General Electric Company had consented, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana.

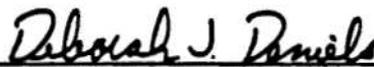
WHEREFORE, THE UNITED STATES ATTORNEY CHARGES THAT:

27. Beginning on or about the 24th day of July, 1988, and continuing until August 7, 1988, near Mount Vernon, Posey County, within the Southern District of Indiana, and elsewhere,

JOHN DAVID TOWERY,

the Defendant herein, did knowingly transport and sell in interstate commerce, that is, from the State of Indiana to the State of Kentucky, an archaeological resource or resources, specifically, material remains of past human life or activities of archaeological interest and over one hundred years of age; all of the foregoing archaeological resources having been excavated, removed and transported in violation of any provision in effect under Indiana law, to-wit: the excavation, removal or transportation of the said archaeological resources constituted criminal trespass and criminal conversion under Indiana law.

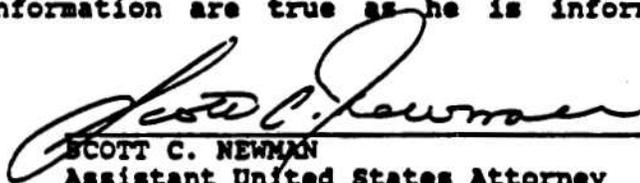
All in violation of Title 16, United States Code, Section 470ee.


DEBORAH J. DANIELS *8/2/88*
United States Attorney
Southern District of Indiana

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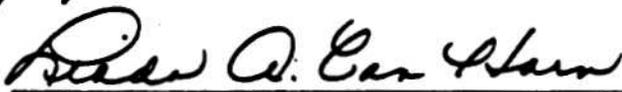
STATE OF INDIANA)
) ss:
COUNTY OF MARION)

SCOTT C. NEWMAN, being first duly sworn, upon his oath, deposes and says, that he is a duly appointed Assistant United States Attorney for the Southern District of Indiana, and in the above-captioned matter makes this Affidavit for and on behalf of the United States of America, and that the allegations in the foregoing information are true as he is informed and verily believes.



SCOTT C. NEWMAN
Assistant United States Attorney

Subscribed and sworn to before me, a Notary Public, this
10 day of July, 1991.



Notary Public LINDA A. VAN HORN

My Commission Expires: 1-5-93
My County of Residence: MARION

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
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 v.)
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 DANNY GENE GLOVER,)
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 Defendant.)

NO. EV 91-20-CR

I N F O R M A T I O N

The United States Attorney charges that:

AT ALL TIMES PERTINENT HERETO:

1. GE Plastics Manufacturing Division, Mount Vernon Plant Site (hereinafter "GE Plastics"), was a complex of manufacturing and warehouse facilities owned by the General Electric Company, a New York corporation duly licensed and qualified to do business in the State of Indiana, and engaged in the manufacture of plastic materials and resins. GE Plastics was located near Old State Road 69, immediately southwest of the City of Mount Vernon, Posey County, Indiana.

2. Located directly to the south of, and immediately adjacent to, the intersection of New Highway 69 and County Road 850S, on property owned by the General Electric Company, there existed a prominent upland knob or ridge. This knob or ridge (hereinafter referred to as "the GE Site") contained, under the

surface of the ground, an archaeological resource, specifically, a Hopewell Indian ceremonial site dating from the Middle Woodland Period of the Hopewell civilization, a period corresponding approximately to the first centuries A.D. The GE Site contained within it thousands of artifacts of the Hopewell civilization, including but not limited to flint tools, pottery, chert projectile points, quartz crystal blades, obsidian blades, carved cannel coal, mica, copper axe-heads or "celts," shell beads, freshwater pearls, animal bone, portions of human mandibles, drilled bear teeth, items of wood and leather, or fragments of each of the foregoing categories of artifacts.

3. Indiana law, at Indiana Code Section 35-43-2-2, provided that "[a] person who . . . [k]nowingly or intentionally interferes with the possession or use of the property of another person without the person's consent . . . commits criminal trespass."

4. Indiana law, at Indiana Code Section 35-43-4-3, further provided that "[a] person who knowingly or intentionally exerts unauthorized control over property of another commits criminal conversion." A person's control over property of another was "unauthorized" under Indiana law if it was exerted, among other means, "[w]ithout the other person's consent," or

"[i]n a manner or to an extent other than that to which the other person has consented."

5. Boyd Brothers, Incorporated (hereinafter "Boyd Brothers"), of Sesser, Illinois, was an earth-moving contractor that had been awarded contracts in conjunction with the construction of a new county road (to be known as County Road 850S) in the vicinity of the GE Plastics Plant near Mount Vernon, Indiana. Specifically, Boyd Brothers had contracted to haul "borrow" dirt from the flanks of the upland knob or ridge (the GE Site) for use as fill during road construction, and to provide grading and reclamation of General Electric lands adjacent to the road construction project.

6. John William Way, known as "Bill" Way, was employed by Boyd Brothers as a heavy equipment operator, and performed duties on property owned by the General Electric Company at the location of the "borrow" areas adjacent to the county road construction project described herein.

7. John David Towery was a resident of Panther, in the State of Kentucky, and a long-time acquaintance of the Defendant, DANNY GENE GLOVER.

8. Arthur Joseph Gerber was a resident of Tell City, in the State of Indiana, and a long-time acquaintance of the Defendant, DANNY GENE GLOVER.

9. DANNY GENE GLOVER, the Defendant herein, was a resident of Panther, in the State of Kentucky.

THE UNITED STATES ATTORNEY FURTHER CHARGES THAT:

10. Beginning on or about July 24, 1988, and continuing until on or about the 7th day of August, 1988, DANNY GENE GLOVER excavated and removed, and aided the excavation and removal from the GE Site of numerous Hopewell Indian artifacts which had been buried under the surface of the ground, as more fully set forth hereinafter. The artifacts so removed and excavated included approximately seven (7) copper axeheads (known as "celts"); fourteen (14) drilled bear teeth; twenty-six (26) pearl beads; nine (9) copper spools adorned with silver; two (2) copper pins; one (1) copper plate; three (3) rounded half-spheres made of silver; numerous fragments of copper; and numerous pieces of carved flint and chert points.

11. Thereafter, DANNY GENE GLOVER transported and sold, and aided the transportation and sale, in interstate commerce, of the foregoing archaeological resources, as more fully set forth hereinafter.

**THE EXCAVATION, REMOVAL, TRANSPORTATION AND SALE OF THE
ARCHAEOLOGICAL RESOURCES LISTED ABOVE WAS ACCOMPLISHED, IN
SUBSTANCE, AS FOLLOWS:**

12. On or about June 3, 1988, John William Way, known as "Bill" Way, while operating a bulldozer on property of the General Electric Company adjacent to the county road construction project near Mount Vernon, Indiana, uncovered hundreds of prehistoric Indian artifacts from the Hopewell period under the surface of the ground.

13. Neither John William Way, nor any other agent or employee of Boyd Brothers, Inc., notified proper authorities of the discovery of a concentration of archaeological materials, as required by the Standard Specifications of the Indiana Department of Highways, and by the archaeological survey and permission to proceed with borrow operations that had been granted to Boyd Brothers.

14. On or about June 3, 1988, and again on June 4, 1988, John William Way excavated and removed numerous prehistoric Indian artifacts from the GE Site, and transported them to his residence in the State of Illinois.

15. On or about July 21, 1988, John William Way sold most of the artifacts he had removed from the GE Site to Arthur Joseph Gerber for the sum of six thousand dollars (\$6,000) paid

in United States Currency. As a part of this transaction, and as further consideration for the receipt of the six thousand dollars (\$6,000) in currency, John William Way agreed to guide Arthur Joseph Gerber to the location of the GE Site.

16. On or about July 22, 1988, and July 23, 1988, Arthur Joseph Gerber contacted John David Towery, informed him of the existence of the GE Site, and requested that he and DANNY GENE GLOVER accompany Arthur Joseph Gerber to the GE Site in order to excavate and remove prehistoric Indian artifacts therefrom.

17. On or about July 24, 1988, DANNY GENE GLOVER and John David Towery accompanied John William Way and Arthur Joseph Gerber to the GE Site, where John William Way designated the location where he believed that the greatest concentration of prehistoric Indian artifacts would be found.

18. On or about July 24, 1988, DANNY GENE GLOVER, John David Towery, and Arthur Joseph Gerber excavated and removed archaeological resources at the GE Site, including drilled bear canines, pearl beads, copper fragments, and flint or chert objects known as "cache blades."

19. On or about July 24, 1988, JOHN DAVID TOWERY, Danny Gene Glover, and Arthur Joseph Gerber valued the archaeological resources they had excavated and removed at the GE Site at one

hundred and fifty dollars (\$150). Thereafter, John David Towery, with the knowledge and approval of DANNY GENE GLOVER, transported a quantity of the said archaeological resources from the State of Indiana to the State of Kentucky.

20. On or about July 27, 1988, John David Towery and Arthur Joseph Gerber, together with another person known to the United States Attorney, returned to the GE Site and excavated and removed archaeological resources, including flint and chert cache blades, fragments of pearl beads and of copper. Thereafter, John David Towery transported a quantity of the said archaeological resources from the State of Indiana to the State of Kentucky.

21. On or about July 31, 1988, DANNY GENE GLOVER, John David Towery, and Arthur Joseph Gerber returned to the GE Site and excavated and removed archaeological resources, including flint and chert cache blades, copper pins, copper spools adorned with silver, a copper plate, drilled bear canines, seven copper axe-heads (known as "celts"), rounded half-spherical objects made of silver, and pearl beads.

22. On or about July 31, 1988, DANNY GENE GLOVER, John David Towery, and Arthur Joseph Gerber valued the archaeological resources they had excavated and removed at the GE Site on that date (excluding the cache blades), at four thousand, five hundred dollars (\$4500). After said evaluation, DANNY GENE GLOVER agreed to sell, and did sell, his share in this quantity of artifacts to

Arthur Joseph Gerber and John David Towery for the approximate sum of \$1,500 paid in currency. John David Towery, with the knowledge and approval of DANNY GENE GLOVER, transported a quantity of the said archaeological resources, in addition to the flint and chert cache blades removed on that date, from the State of Indiana to the State of Kentucky.

23. On or about August 1, 1988, DANNY GENE GLOVER, Arthur Joseph Gerber, and another person known to the United States Attorney, returned to the GE Site and attempted to remove further archaeological resources before being ejected from the property by an agent of GE Plastics.

24. On or about August 6, 1988, and August 7, 1988, at Owensboro, in the State of Kentucky, DANNY GENE GLOVER and John David Towery, with the knowledge and approval of Arthur Joseph Gerber, sold the flint and chert cache blades previously removed from the GE Site to a number of individuals presently unknown to the United States Attorney, for the approximate sum of nine hundred dollars (\$900) in United States Currency. DANNY GENE GLOVER and John David Towery then divided the currency proceeds of the said sales with Arthur Joseph Gerber.

25. Arthur Joseph Gerber thereafter purchased from John David Towery, in the State of Kentucky, the remainder of the archaeological resources previously jointly removed from the GE Site by DANNY GENE GLOVER, John David Towery and Arthur Joseph

Gerber, for the approximate sum of two thousand dollars (\$2,000) in United States Currency in addition to an in-kind exchange of certain unrelated artifacts previously belonging to Arthur Joseph Gerber.

26. The excavation, removal and transportation of the said archaeological resources constituted criminal trespass in violation of Indiana Code, Section 35-43-2-2(4), in that beginning on or about the 24th day of July, 1988, and continuing until on or about the 1st day of August, 1988, in the County of Posey, State of Indiana, DANNY GENE GLOVER, the Defendant herein, did knowingly or intentionally interfere with the possession and use of the property of another person, specifically, that piece of real property located on a ridge immediately south of County Road 850S near Mount Vernon, Indiana, herein referred to as the GE Site, being the property of the General Electric Company, by removing items of property from under the surface of the ground, and taking and carrying away such items of property without the consent of the General Electric Company, all of which is contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana.

27. Further, the excavation, removal and transportation of the said archaeological resources constituted criminal conversion, in violation of Indiana Code, Section 35-43-4-3, in

that beginning on or about the 24th day of July, 1988, and continuing until on or about the 1st day of August, 1988, in the County of Posey, State of Indiana, DANNY GENE GLOVER, the Defendant herein, did knowingly exert unauthorized control over property, to-wit: numerous Indian artifacts of historic and economic value, including but not limited to flint and chert points, copper axeheads or celts, freshwater pearls, bear teeth, and items of wood and leather; of another person, to-wit: the General Electric Company; by obtaining, taking and carrying away the foregoing property in a manner and to an extent other than that to which the General Electric Company had consented, all of which is contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana.

WHEREFORE, THE UNITED STATES ATTORNEY CHARGES THAT:

28. Beginning on or about the 24th day of July, 1988, and continuing until on or about August 7, 1988, near Mount Vernon, Posey County, within the Southern District of Indiana, and elsewhere,

DANNY GENE GLOVER,

the Defendant herein, did knowingly transport and sell in interstate commerce, that is, from the State of Indiana to the State of Kentucky, an archaeological resource or resources,

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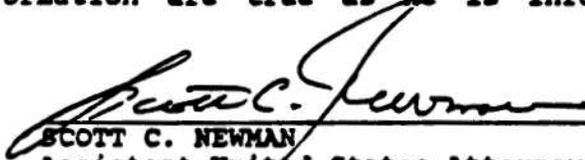
specifically, material remains of past human life or activities of archaeological interest and over one hundred years of age; the foregoing archaeological resources having a commercial or archaeological value, in addition to the cost of restoration or repair of such resources, in excess of \$5,000; and all of the foregoing archaeological resources having been excavated, removed and transported in violation of any provision in effect under Indiana law, to-wit: the excavation, removal or transportation of the said archaeological resources constituted criminal trespass and criminal conversion under Indiana law.

All in violation of Title 16, United States Code, Section 470ee(c).

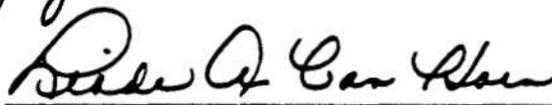
Deborah J. Daniels
DEBORAH J. DANIELS *by TDA*
United States Attorney
Southern District of Indiana

STATE OF INDIANA)
) ss:
COUNTY OF MARION)

SCOTT C. NEWMAN, being first duly sworn, upon his oath, deposes and says, that he is a duly appointed Assistant United States Attorney for the Southern District of Indiana, and in the above-captioned matter makes this Affidavit for and on behalf of the United States of America, and that the allegations in the foregoing Information are true as he is informed and verily believes.


SCOTT C. NEWMAN
Assistant United States Attorney

Subscribed and sworn to before me, a Notary Public, this
10 day of July, 1991.


Notary Public LINDA A. VAN HORN

My Commission Expires: 1-5-93
My County of Residence: MARION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

FILED
U.S. DISTRICT COURT
INDIANAPOLIS & GREENSBORO

JUL 1991

SOUTHERN DISTRICT OF INDIANA
JUDICIAL COUNCIL
CLERK

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 ARTHUR JOSEPH GERBER,)
)
 Defendant.)

CAUSE NO. EV 91-19 -CR

INDICTMENT

COUNT ONE

The Conspiracy To Purchase And Sell
Unlawfully Removed Archaeological Resources

I. Background

A. The Pertinent Law

The Grand Jury charges that:

At all times pertinent hereto:

1. Federal law, at Title 16, United States Code, Section 470ee(c) provided that:

No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange, in interstate or foreign commerce, any archaeological resource excavated, removed, sold, purchased, exchanged, transported or received in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law.

2. Indiana law, at Indiana Code Section 35-43-2-2, provided that:

[a] person who ... [k]nowingly or intentionally interferes with the possession or use of the property of another person without the person's consent ... commits criminal trespass.

3. Indiana law, at Indiana Code Section 35-43-4-3, provided that:

[a] person who knowingly or intentionally exerts unauthorized control over property of another commits criminal conversion.

4. The law applicable to federally funded highway projects required companies engaged in the construction of public roadways to obtain an archaeological survey of the construction site prior to receiving governmental authorization to begin construction and further required those companies to notify appropriate authorities in the event archaeological sites were discovered in the course of construction.

5. Section 104.06 ("Rights in and Use of Materials Found on the Property") of the Indiana Department of Highways Standard Specifications, provided that:

[i]f archaeological artifacts are encountered during excavation operations, the Contractor shall cease operations in the immediate vicinity and notify the Engineer. An Archaeologist will be provided by the State and a determination will be made as to the significance and the disposition of such findings. In no event will any employee of the Contractor or the State of Indiana share in such ownership, or profit from any salvaged archaeological findings.

B. The Principal Parties

6. **ARTHUR JOSEPH GERBER**, the Defendant herein, was a resident of Tell City, in the State of Indiana.

7. **Danny Gene Glover**, an unindicted co-conspirator in this cause, was a resident of the State of Kentucky.

8. **John David Towery**, an unindicted co-conspirator in this cause, was a resident of the State of Kentucky.

9. **John William (Bill) Way**, an unindicted co-conspirator in this cause, was a resident of Grayville, in the State of Illinois.

10. **GE Plastics Manufacturing Division, Mount Vernon Plant Site** (hereinafter "GE"), was a complex of manufacturing and warehouse facilities owned by the General Electric Company and engaged in the manufacture of plastic materials and resins. GE Plastics was located near Old State Road 69, immediately southwest of the City of Mount Vernon, Posey County, Indiana.

11. **J. H. Rudolph & Company, Inc.** (hereinafter "J. H. Rudolph") was a general road construction contractor with offices in Evansville, Indiana and elsewhere.

12. **Boyd Brothers, Incorporated** (hereinafter "Boyd Brothers") was an earth-moving contractor with offices in Sesser, Illinois.

C. The Discovery of a Hopewell Indian Ceremonial and Burial Site On the Property of GE

13. Prior to the summer of 1987, the Indiana Department of Highways (hereinafter "IDOH") authorized the construction of a new road near the entrance to GE. The road, known as County Road 850S, was intended to connect Old State Road 69 with New State Road 69 and improve the movement of highway traffic near GE. Funds for the construction of the road were provided by the Federal Highway Administration and the General Electric Company. The construction project was administered by the IDOH in accordance with its regulations and specifications and designated by the IDOH as Project Number RS-6665().

14. Located on property owned by GE and adjacent to the land to be used in the construction of County Road 850S there existed a prominent knob or ridge. This knob or ridge (hereinafter referred to as the "GE Site") contained, under the surface of the ground, an archaeological resource; namely, a Hopewell Indian ceremonial and burial site. The site dated from the Middle Woodland period of civilization known as Hopewell, a period of time corresponding approximately to the first centuries A.D. or approximately two thousand years ago.

15. The GE site contained, within its earthen enclosure, thousands of archaeological resources consisting of artifacts of the Hopewell civilization; including but not limited to:

- a. axe-heads shaped from copper and known as "celts";
- b. burnt human bone

- c. carved human mandibles
- d. spear blades shaped from quartz crystal
- e. pottery fragments
- f. spear blades shaped from obsidian
- g. earspools made from copper and ornamented with silver
- h. freshwater pearls
- i. animal bone
- j. mica
- k. bear teeth with drilled holes
- l. blade-like objects shaped from cannel coal
- m. general purpose tools shaped from flint
- n. chert projectile points
- o. copper pins
- p. shell beads
- q. items of wood and leather
- r. copper plates and sheets
- s. fragments of each of the above categories of artifacts

16. J. H. Rudolph was awarded the general contract for the construction of County Road 850S. J. H. Rudolph awarded a subcontract to Boyd Brothers to perform work on the road project.

17. During the spring and early summer of 1988, Boyd Brothers performed earth-moving work on and near the GE site in connection with construction of County Road 850S. Prior to those activities, Boyd Brothers obtained an archaeological survey of the area. The survey failed to identify any archaeological site but required that immediate notification be given to the State of Indiana in the event excavation operations uncovered archaeological resources.

18. On or about June 3, 1988, John William Way was employed as a heavy equipment operator for Boyd Brothers and was assigned to conduct earth-moving work on GE property located adjacent to County Road 850S.

19. On or about the same date, while operating a bulldozer on the GE site as part of his work, John William Way unearthed the Hopewell Indian ceremonial and burial site and in doing so discovered thousands of artifacts which had been previously concealed beneath the surface of the ground.

20. Neither John William Way nor any other agent or employee of Boyd Brothers notified proper authorities of the discovery of the archaeological site.

21. After making the discovery, John William Way unlawfully removed large quantities of the artifacts from the site and transported them to his residence in Grayville, Illinois.

II. The Scope and Objectives of the Conspiracy

22. Beginning in or about July, 1988, and continuing until in or about July, 1989, near Mount Vernon, Posey County, within the Southern District of Indiana and elsewhere,

ARTHUR JOSEPH GERBER,

the Defendant herein, did knowingly and intentionally conspire and agree together with John William Way, Danny Gene Glover, John David Towery and others known and unknown to the Grand Jury to commit the following crimes against the United States; to wit:

To knowingly sell, purchase, exchange, transport, and receive, and to offer to sell, purchase, and exchange, in interstate commerce, archaeological resources consisting

of material remains of past human life or activities of archaeological interest, being over one hundred years of age and having a commercial or archaeological value in excess of \$5,000; all of which archaeological resources having been excavated, removed and transported in violation of any provision, rule, regulation, ordinance or permit in effect under Indiana State or local law; to wit:

(a) in violation of the Indiana criminal trespass statute;

(b) in violation of the Indiana criminal conversion statute;

(c) in violation of state requirements for conducting borrow operations for federally funded highway projects; and

(d) in violation of the provisions of the Indiana Department of Highway Standard Specifications;

all in violation of Title 16, United States Code, Section 470ee(c); as more fully described hereinafter.

23. It was a material part, among others, of said illegal agreement that ARTHUR JOSEPH GERBER:

a. negotiated for and purchased hundreds of artifacts previously removed by John William Way from the GE site; which purchase agreement further required John William Way to disclose the precise location of the GE site to ARTHUR JOSEPH GERBER;

b. recruited others, including Danny Gene Glover and John David Towery, to assist in the location and removal of artifacts still buried within the GE site;

c. trespassed upon property belonging to General Electric;

d. participated in the disturbance and destruction of the archaeological resource located at the GE site;

e. removed and assisted in the removal of hundreds of prehistoric Indian artifacts from the GE site;

f. negotiated the purchase, sale and exchange of artifacts among persons engaged in the unlawful removal of said artifacts;

g. converted artifacts to his exclusive personal use and enjoyment; and

h. sought to profit and did profit financially from the subsequent public sale of certain artifacts previously removed from the GE site.

24. The within-described excavation, removal and transportation of the said archaeological resources constituted criminal trespass in violation of Indiana Code, Section 35-43-2-2(4), in that beginning on or about June 3, 1988, and continuing until on or about August 1, 1988, in the County of Posey, State of Indiana, ARTHUR JOSEPH GERBER, the Defendant herein, and others known to the Grand Jury, did knowingly and intentionally interfere

with the possession and use of the property of another person, specifically that piece of real property located on a ridge immediately south of County Road 850S near Mount Vernon, Indiana, herein referred to as the GE Site, being the property of the General Electric Company, by removing items of property from under the surface of the ground, and taking and carrying away such items of property without the consent of the General Electric Company, all of which is contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana.

25. Further, the excavation, removal and transportation of the said archaeological resources constituted criminal conversion, in violation of Indiana Code, Section 35-43-4-3, in that beginning on or about June 3, 1988, and continuing until on or about August 1, 1988 in the County of Posey, State of Indiana, ARTHUR JOSEPH GERBER, the Defendant herein, and others known to the Grand Jury, did knowingly exert unauthorized control over property, to-wit: numerous Indian artifacts of historic and economic value, including but not limited to flint and chert points, copper pins and plates, copper axe-heads or celts, copper spools adorned with silver, bear teeth and freshwater pearls; of another person, to-wit: the General Electric Company; by obtaining, taking and carrying away the foregoing property without consent and in a manner and to an extent other than that to which the General Electric Company had consented, all of which is contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana.

III. Overt Acts In Furtherance Of The Conspiracy

To accomplish the aims of the conspiracy, ARTHUR JOSEPH GERBER or one or more of his co-conspirators did commit the following overt acts, among others:

26. In or about July, 1988, but not later than July 20, 1988, ARTHUR JOSEPH GERBER travelled from the State of Indiana to the residence of John William Way in the State of Illinois where GERBER took photographs of the artifacts previously removed by Way from the GE site and negotiated the purchase of the artifacts from Way.

27. On or about July 21, 1988, ARTHUR JOSEPH GERBER again travelled from the State of Indiana to the State of Illinois, where he purchased from John William Way a substantial portion of the artifacts that John William Way had wrongfully removed from the GE Site; including approximately ten copper axe-heads (known as "celts"), thirty bear teeth, one piece of cannel coal, five pieces of obsidian, two pieces of leather, numerous freshwater pearls and seven hundred pieces of flint. In return for the several hundred artifacts received from Way, Gerber paid Way the sum of six thousand dollars (\$6,000.00) in United States Currency. As a part of this transaction, and as further consideration for the receipt of the six thousand dollars (\$6,000.00) in currency, John William Way agreed to guide ARTHUR JOSEPH GERBER to the location of the GE Site.

28. On or about July 21, 1988, ARTHUR JOSEPH GERBER accompanied John William Way to the GE Site.

29. On or about July 21, 1988, ARTHUR JOSEPH GERBER transported from the State of Illinois to the State of Indiana the archaeological resources he had purchased from John William Way.

30. On or about July 22, 1988, and July 23, 1988, ARTHUR JOSEPH GERBER contacted John David Towery, informed him of the existence of the GE Site, and requested that he and Danny Gene Glover accompany him to the GE Site in order to excavate and remove prehistoric Indian artifacts therefrom.

31. On or about July 24, 1988, ARTHUR JOSEPH GERBER traveled with John David Towery and Danny Gene Glover to the residence of John William Way in the State of Illinois where they met with Way. Thereafter, ARTHUR JOSEPH GERBER accompanied Way, Towery, and Glover to the GE Site, where Way designated the location where he believed that the greatest concentration of prehistoric Indian artifacts would be found.

32. ARTHUR JOSEPH GERBER, John David Towery and Danny Gene Glover agreed among themselves that each would share equally in all artifacts jointly removed during excavations at the GE site.

33. On or about July 24, 1988, ARTHUR JOSEPH GERBER, John David Towery, and Danny Gene Glover excavated and removed archaeological resources at the GE Site, including fragments of drilled bear canines, obsidian, cannel coal, leather, shell beads, pearl beads, and copper, and numerous flint or chert objects known as "cache blades."

34. On or about July 24, 1988, ARTHUR JOSEPH GERBER, John David Towery and Danny Gene Glover jointly valued the archaeological resources (excluding the cache blades) which they had excavated and removed at the GE Site at one hundred and fifty dollars (\$150.00).

35. Thereafter, on July 24, 1988, ARTHUR JOSEPH GERBER and John David Towery agreed to purchase Danny Gene Glover's share of the artifacts, excluding the cache blades. With the knowledge and agreement of ARTHUR JOSEPH GERBER, John David Towery then transported a quantity of the archaeological resources, consisting of the cache blades and other items, from the State of Indiana to the State of Kentucky.

36. On or about July 26 or July 27, 1988, the exact date being unknown to the Grand Jury, ARTHUR JOSEPH GERBER and John David Towery, together with another person known to the Grand Jury, returned to the GE Site and excavated and removed archaeological resources, including flint and chert cache blades, fragments of pearl beads and copper. Thereafter, with the knowledge and agreement of ARTHUR JOSEPH GERBER, John David Towery transported a quantity of the said archaeological resources, consisting of the cache blades and other items, from the State of Indiana to the State of Kentucky.

37. On or about July 31, 1988, ARTHUR JOSEPH GERBER, John David Towery and Danny Gene Glover returned to the GE Site and excavated and removed archaeological resources, including flint and

chert cache blades, copper pins, copper spools adorned with silver, a copper plate, drilled bear canines, seven copper axe-heads (known as "celts"), rounded half-spherical objects made of silver, and pearl beads.

38. On or about July 31, 1988, ARTHUR JOSEPH GERBER, John David Towery, and Danny Gene Glover jointly valued the archaeological resources they had excavated and removed at the GE Site on that date (excluding the cache blades), at four thousand, five hundred dollars (\$4,500.00). After said evaluation, Danny Gene Glover agreed to sell, and did sell, his share in this quantity of artifacts to ARTHUR JOSEPH GERBER and John David Towery for the approximate sum of one thousand, five hundred dollars (\$1,500.00) to be paid in currency.

39. Thereafter, on or about July 31, 1988, with the knowledge and agreement of ARTHUR JOSEPH GERBER, John David Towery transported a quantity of the said archaeological resources, consisting of the cache blades and other items, from the State of Indiana to the State of Kentucky.

40. On or about August 1, 1988, ARTHUR JOSEPH GERBER, Danny Gene Glover, and another person known to the Grand Jury, returned to the GE Site and attempted to remove further archaeological resources before being ejected from the property by an agent of GE Plastics.

41. During the course of the several excavations at the GE site, ARTHUR JOSEPH GERBER took photographs of the artifacts after

their discovery and while still situated in the ground and after their excavation and removal.

42. On or about August 6, 1988, and August 7, 1988, John David Towery and Danny Gene Glover, with the knowledge and agreement of ARTHUR JOSEPH GERBER, travelled to a commercial Indian artifacts exhibition organized by ARTHUR JOSEPH GERBER at Owensboro, in the State of Kentucky. On the same dates, at and in the immediate vicinity of the said artifacts exhibition, within the State of Kentucky, and with the full knowledge and consent of ARTHUR JOSEPH GERBER, John David Towery and Danny Gene Glover sold the flint and chert cache blades previously removed from the GE Site to a number of individuals presently unknown to the Grand Jury, for the approximate sum of nine hundred dollars (\$900.00) in United States Currency.

43. On or about August 6, 1988, and August 7, 1988, ARTHUR JOSEPH GERBER, John David Towery, and Danny Gene Glover divided equally among themselves the currency proceeds of the sales of the flint and chert cache blades wrongfully removed by them from the GE Site.

44. Beginning in or about August, 1988, and continuing until in or about the spring of 1989, the exact dates being unknown to the Grand Jury, ARTHUR JOSEPH GERBER made telephone calls and traveled from the State of Indiana to the State of Kentucky for the purpose of offering to purchase John David Towery's remaining share of the archaeological resources previously jointly removed from the GE Site

by ARTHUR JOSEPH GERBER, John David Towery, and Danny Gene Glover. In or about the spring of 1989, John David Towery agreed to the sale of said artifacts to ARTHUR JOSEPH GERBER. As the terms of the sale, ARTHUR JOSEPH GERBER paid or exchanged to John David Towery the approximate sum of two thousand dollars (\$2,000.00) in United States Currency, in addition to an in-kind exchange of certain unrelated artifacts previously belonging to GERBER. Pursuant to said agreement, in or about March 1989, ARTHUR JOSEPH GERBER took possession of said artifacts at the residence of John David Towery in the State of Kentucky and transported them to the State of Indiana. Pursuant to said agreement, in or about July 1989, ARTHUR JOSEPH GERBER completed payment to John David Towery for said artifacts.

45. ARTHUR JOSEPH GERBER, during the course and in furtherance of the conspiracy, also committed various overt acts with intent to impede or obstruct the detection, investigation and prosecution by law enforcement authorities and by the Grand Jury of the foregoing conspiracy to unlawfully convert, transport, purchase and sell archaeological resources in interstate commerce, which further overt acts are more fully described below.

46. On or about July 21, 1988, July 24, 1988, July 31, 1988, August 6, 1988, August 7, 1988, and beginning in the month of March, 1989, and continuing on several occasions until in or about the month of July, 1989, ARTHUR JOSEPH GERBER, when engaging in the above-described transactions involving unlawfully converted

prehistoric Indian artifacts, conducted said transactions in the form of United States Currency, so as to conceal such transactions and to render them more difficult to trace and to document.

47. During in or about the month of February, 1989, the exact date being unknown to the Grand Jury, at Tell City, within the Southern District of Indiana, ARTHUR JOSEPH GERBER advised Danny Gene Glover not to divulge to law enforcement authorities that ARTHUR JOSEPH GERBER, Danny Gene Glover, and others known to the Grand Jury had removed archaeological resources from the GE Site.

48. On two occasions, beginning in or about July, 1989, and continuing until not later than the month of October, 1989, the exact dates being unknown to the Grand Jury, at Evansville, within the Southern District of Indiana, ARTHUR JOSEPH GERBER met with John William Way in the presence of other persons known to the Grand Jury, and advised John William Way not to divulge to law enforcement authorities that ARTHUR JOSEPH GERBER had engaged in transactions involving unlawfully converted prehistoric Indian artifacts from the GE Site with John William Way.

49. On or about December 18, 1989, having received a Grand Jury subpoena commanding him to produce on that date, among other things, "Any and all photographs or visual depictions of any and all Indian artifacts acquired by Arthur Gerber . . . between March 1, 1988, and January 1, 1989," ARTHUR JOSEPH GERBER deliberately withheld and failed to produce numerous photographs which he had

himself taken of prehistoric Indian artifacts removed, and being removed, from the GE Site, and which artifacts had been acquired by ARTHUR JOSEPH GERBER between the pertinent dates.

All in violation of Title 18, United States Code, Section 371.

COUNT TWO

**The Purchase of Unlawfully Removed
Artifacts From John William Way**

The Grand Jury charges that:

1. The Grand Jury hereby realleges and incorporates by reference, as if the same were fully set forth in the present count of this Indictment, Paragraphs 1 through 6; 9 through 21; 24 through 29, above, inclusive.

2. On or about the 21st day of July, 1988, within the Southern District of Indiana,

ARTHUR JOSEPH GERBER,

the Defendant herein, did knowingly purchase and transport in interstate commerce, that is, from the State of Illinois to the State of Indiana, archaeological resources consisting of material remains of past human life or activities of archaeological interest, being over one hundred (100) years of age and having a commercial or archaeological value in excess of \$5,000; all of which archaeological resources having been excavated, removed, and

transported in violation of any provision, rule, regulation, ordinance or permit in effect under Indiana State or local law, to-wit:

- (a) in violation of the Indiana criminal trespass statute;
- (b) in violation of the Indiana criminal conversion statute;
- (c) in violation of state requirements for conducting borrow operations for federally funded highway projects; and
- (d) in violation of the provisions of the Indiana Department of Highway Standard Specifications;

In violation of Title 16, United States Code, Section 470ee(c).

COUNT THREE

**The July 24, 1988 Purchase and Transport of
Unlawfully Removed Artifacts From The GE Site**

The Grand Jury further charges that:

1. The Grand Jury hereby realleges and incorporates by reference, as if the same were fully set forth in the present count of this Indictment, Paragraphs 1 through 3; 6 through 21; 24 and 25; and 30 through 35; above, inclusive.

2. On or about the 24th day of July, 1988, at Mount Vernon, Posey County, within the Southern District of Indiana, and elsewhere,

ARTHUR JOSEPH GERBER,

the Defendant herein, did knowingly purchase, transport, and cause to be transported in interstate commerce, that is, from the State of Indiana to the State of Kentucky, archaeological resources consisting of material remains of past human life or activities of archaeological interest, being over one hundred (100) years of age; all of which archaeological resources having been excavated, removed, and transported in violation of any provision in effect under Indiana State law, to-wit:

- (a) in violation of the Indiana criminal trespass statute; and
- (b) in violation of the Indiana criminal conversion statute.

In violation of Title 16, United States Code, Sections 470ee(c) and 470ee(d), and Title 18, United States Code, Section 2.

COUNT FOUR

**The July 26 or 27, 1988 Transport
Of Unlawfully Removed Artifacts From The GE Site**

The Grand Jury further charges that:

1. The Grand Jury hereby realleges and incorporates by reference, as if the same were fully set forth in the present count of this Indictment, Paragraphs 1 through 3; 6 through 21; 24 and 25; 30 through 36; above, inclusive.

2. On or about the 26th or 27th day of July, 1988, the exact date being unknown to the Grand Jury, at Mount Vernon, Posey County, within the Southern District of Indiana, and elsewhere,

ARTHUR JOSEPH GERBER,

the Defendant herein, did knowingly transport and cause to be transported in interstate commerce, that is, from the State of Indiana to the State of Kentucky, archaeological resources consisting of material remains of past human life or activities of archaeological interest, being over one hundred (100) years of age, all of which archaeological resources having been excavated, removed, and transported in violation of any provision in effect under Indiana state law, to-wit:

- (a) in violation of the Indiana criminal trespass statute; and
- (b) in violation of the Indiana criminal conversion statute.

In violation of Title 16, United States Code, Sections 470ee(c) and 470ee(d) and Title 18, United States Code, Section 2.

COUNT FIVE

**The July 31, 1988 Purchase And Transport Of
Unlawfully Removed Artifacts From The GE Site**

The Grand Jury further charges that:

1. The Grand Jury hereby realleges and incorporates by reference, as if the same were fully set forth in the present count of this Indictment, Paragraphs 1 through 3; 6 through 21; 24 and 25; 30 through 39; above, inclusive.

2. On or about the 31st day of July, 1988, at Mount Vernon, Posey County, within the Southern District of Indiana, and elsewhere,

ARTHUR JOSEPH GERBER,

the Defendant herein, did knowingly purchase, transport and cause to be transported in interstate commerce, that is, from the State of Indiana to the State of Kentucky, archaeological resources consisting of material remains of past human life or activities of archaeological interest, being over one hundred (100) years of age; all of which archaeological resources having been excavated, removed, and transported in violations of any provision in effect under Indiana state law, to-wit:

(a) in violation of the Indiana criminal trespass statute; and

(b) in violation of the Indiana criminal conversion statute.

In violation of Title 16, United States Code, Sections 470ee(c) and 470ee(d), and Title 18, United States Code, Section 2.

COUNT SIX

**The August 1988 Commercial Sale Of
Unlawfully Removed Artifacts From The GE Site**

The Grand Jury further charges that:

1. The Grand Jury hereby realleges and incorporates by reference, as if the same were fully set forth in the present count of this Indictment, Paragraphs 1 through 3; 6 through 21; 24 and 25; 30 through 43; above, inclusive.

2. From on or about the 6th day of August, 1988, to on or about the 7th day of August, 1988, within the Southern District of Indiana and the Western District of Kentucky,

ARTHUR JOSEPH GERBER,

the Defendant herein, did knowingly sell and cause to be sold in interstate commerce, that is having moved between the State of Indiana and the State of Kentucky, archaeological resources consisting of material remains of past human life or activities of archaeological interest, being over one hundred (100) years of age; all of which archaeological resources having been excavated,

removed, and transported in violation of any provision in effect under Indiana state law, to-wit:

- (a) in violation of the Indiana criminal trespass statute; and
- (b) in violation of the Indiana criminal conversion statute.

In violation of Title 16, United States Code, Sections 470ee(c) and 470ee(d), and Title 18, United States Code, Section 2.

COUNT SEVEN

**The 1989 Purchase And Transport Of
Unlawfully Removed Artifacts From The GE Site**

The Grand Jury further charges that:

1. The Grand Jury hereby realleges and incorporates by reference, as if the same were fully set forth in the present count of this Indictment, Paragraphs 1 through 3; 6 through 21; 24 and 25; 30 through 44; above, inclusive.
2. Beginning in or about the month of August 1988 and continuing until no later than the month of July, 1989, the exact dates being unknown to the Grand Jury, within the Southern District of Indiana and the Western District of Kentucky,

ARTHUR JOSEPH GERBER,

the Defendant herein, did knowingly purchase and transport in interstate commerce, that is, from the state of Kentucky to the State of Indiana, archaeological resources consisting of material remains of past human life or activities of archaeological interest, being over one hundred (100) years of age; all of which archaeological resources having been excavated, removed and transported in violation of any provision in effect under Indiana state law, to-wit:

- (a) in violation of the Indiana criminal trespass statute; and
- (b) in violation of the Indiana criminal conversion statute.

In violation of Title 16, United States Code, Section 470ee(c).

FORFEITURE

The Grand Jury further charges that:

1. The Grand Jury hereby realleges and incorporates by reference, as if the same were fully set forth in the present prayer for forfeiture of this Indictment, all Paragraphs of Counts 1 through 7, above, inclusive.

2. The Archaeological Resources Protection Act of 1979, at Title 16, United States Code, Section 470gg(b), further provided that "[a]ll archaeological resources with respect to which a violation of [the Act] occurred and which are in the possession of any person, and all vehicles . . . of any person which were used in connection with such violation, may be (in the discretion of the court . . .) subject to forfeiture to the United States upon --

(1) such person's conviction of such violation...;

* * * *

[or]

(3) a determination by any court that such archaeological resources [or] vehicles . . . were involved in such violation.

3. As a part and result of the conduct described in the foregoing counts of the Indictment, ARTHUR JOSEPH GERBER, the Defendant herein, has acquired possession of archaeological resources with respect to which a violation of Title 16, United States Code, Section 470ee(c) has occurred. Specifically, ARTHUR

JOSEPH GERBER has acquired possession of the following archaeological resources with respect to which such violations have occurred, and are therefore subject to forfeiture:

(A) Nine (9) copper spools, approximately two inches in diameter with silver on one side and a hole in the center;

(B) Three (3) pieces of silver, half-spherical in shape, each approximately three inches in diameter;

(C) Approximately forty-four (44) drilled bear canines;

(D) Seventeen (17) solid copper axe-heads, known as celts, ranging from approximately three to twelve inches in length;

(E) Two (2) copper pins, approximately six inches in length, sharpened at both ends;

(F) A quantity of shell and freshwater pearl beads;

(G) A thin copper plate approximately four or five inches in length;

(H) Approximately seven hundred (700) flint cache blades;

(I) Fragments of any of the foregoing categories of artifacts or materials, as well as of cannel coal, mica, flint, chert, leather, and obsidian.

4. ARTHUR JOSEPH GERBER further maintains an ownership or possessory interest in the following vehicles which were used in the unlawful transportation of archaeological resources, and therefore constitute vehicles of any person used in connection with a violation of Title 16, United States Code, Section 470ee(c), and subject to forfeiture:

(A) A Grey 1988 Honda Accord, VIN Number 1HGCA5545JA061974;

(B) A Red 1979 Chevrolet Pickup Truck, VIN Number
CCD149A100994.

A TRUE BILL:

Michael J. Kowalski

Foreperson of the Grand Jury

Deborah J. Daniels

DEBORAH J. DANIELS
United States Attorney
Southern District of Indiana

Larry A. Mackey

LARRY A. MACKEY
Chief, Criminal Division
Southern District of Indiana

Scott E. Newman

SCOTT E. NEWMAN
Assistant United States Attorney
Southern District of Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

FILED
U.S. DISTRICT COURT
INDIANA DIVISION
92 JAN 21 AM 11:01
SOUTHERN DISTRICT
OF INDIANA
JOHN A. O'NEAL
CLERK

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
ARTHUR JOSEPH GERBER,)
)
Defendant.)

NO. EV 91-19-CR

GOVERNMENT'S RESPONSE AND
MEMORANDUM OF LAW IN
OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS INDICTMENT

Now comes the United States of America, by Deborah J. Daniels, United States Attorney for the Southern District of Indiana, and by Larry A. Mackey and Scott C. Newman, Assistant United States Attorneys, and respectfully submits its Response and Memorandum of Law in Opposition to Defendant's Motion to Dismiss Indictment, in support whereof the government would show the Court as follows:

1. That the plain language of the "trafficking" provision of the Archaeological Resources Protection Act [16 U.S.C. § 470ee(c)] prohibits interstate commerce in archaeological resources excavated or removed in violation of "any" provision or permit in effect under state or local law, including state conversion and trespass laws, and permits issued to allow highway construction.

2. That the rule of lenity, therefore, is inapplicable in this case.

3. That the Archaeological Resources Protection Act [16 U.S.C. §§ 470aa et seq.] placed the defendant on notice as to what conduct was prohibited by its terms, and therefore was not void for vagueness under the Due Process Clause of the Fifth Amendment to the United States Constitution.

4. That the Archaeological Resources Protection Act [16 U.S.C. §§ 470aa et seq.], in adding potential civil penalties for unlawful removal of archaeological resources from public lands, did not implicate Equal Protection concerns under the Fifth Amendment to the United States Constitution, nor abridge any constitutional right of this defendant.

5. That the instant prosecution was timely filed within the applicable limitations period.

In support whereof, the government would submit its Memorandum of Law, as follows.

MEMORANDUM OF LAW

I. BACKGROUND

Defendant Arthur Joseph Gerber has been charged, by way of Grand Jury Indictment, with one count of conspiracy to violate the

Archaeological Resources Protection Act (hereinafter, "ARPA"), and six separate substantive ARPA violations (one felony and five misdemeanors). The Indictment alleges that Defendant Gerber unlawfully excavated and removed hundreds of specifically described prehistoric Indian artifacts, being property of the General Electric Company, and transported them (or caused them to be transported) in interstate commerce in violation of federal law. The Indictment further alleges that Defendant Gerber knowingly trafficked, in interstate commerce, in similar artifacts that had been unlawfully removed by others, in violation of federal law.

In twenty-four pages and some sixty-one rhetorical paragraphs, the Indictment alleges in detail that Defendant Gerber learned from a highway construction worker of the existence and precise location of a prehistoric Indian mound on General Electric property in Posey County, Indiana. The construction worker, John William Way, had himself illegally excavated and removed numerous artifacts from the site.

The Indictment further alleges that Defendant Gerber travelled to the State of Illinois in order to purchase, with currency, the unlawfully removed artifacts from Way. Thereafter, Gerber recruited others to return to the site, where they jointly excavated and removed numerous artifacts of flint, copper, pearl, shell, and silver. These artifacts were then transported, and, in

some instances, sold in interstate commerce. The Indictment also alleges certain overt acts of the Defendant in attempting to prevent law enforcement authorities from learning of the foregoing events.

In addition to charging each element of the federal conspiracy and ARPA violations, the Indictment then sets forth, in appropriate formal charging language under Indiana law, the precise state law and permit violations alleged as predicates to each ARPA conspiracy and trafficking offense. Thus, the excavation and removal of the artifacts is alleged to be without the authority of the owner, in violation of the Indiana criminal conversion and trespass statutes. Further, the removal of the artifacts during highway construction excavation is alleged to have violated the terms of a construction permit, which incorporated terms specifically addressing the protection of archaeological sites discovered during highway construction.

The Defendant does not challenge the sufficiency of the Indictment to inform him of the charges being proffered against him. Rather, Defendant Gerber has based his Motion to Dismiss the Indictment on the following grounds: (1) that the Indictment fails to state an offense, in that as a matter of statutory construction, ARPA should be given a limiting interpretation incorporating only state and local archaeological resource protection provisions as

predicate acts; (2) that ARPA is ambiguous as to the matter of which state and local laws can be incorporated as predicate acts and, therefore, that the "rule of lenity" should apply to limit its reach; (3) that the subsection of ARPA under which the defendant is charged should be invalidated on the ground of vagueness; (4) that because he is not subject to ARPA's civil penalty provisions, the statutory scheme of civil and criminal penalties established under ARPA violates the defendant's right to equal protection of the laws under the Fifth Amendment; and (5) that this prosecution is barred by the Indiana statutes of limitations applicable to the state predicate offenses.

Each of the foregoing contentions is without merit, and the government will address each in turn.

II. THE PLAIN LANGUAGE OF THE "TRAFFICKING" PROVISION OF ARPA [16 U.S.C. § 470ee(c)] PROHIBITS INTERSTATE COMMERCE IN ARCHAEOLOGICAL RESOURCES EXCAVATED OR REMOVED IN VIOLATION OF "ANY" PROVISION OR PERMIT IN EFFECT UNDER STATE OR LOCAL LAW, INCLUDING STATE CONVERSION AND TRESPASS LAWS, AND PERMITS ISSUED FOR HIGHWAY CONSTRUCTION

The particular provision of ARPA under which Defendant Gerber has been charged states as follows:

- (c) No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange, in interstate or foreign commerce, any archaeological resource excavated, removed, sold, purchased, exchanged, transported or received in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law.

16 U.S.C. § 470ee(c) (emphasis added). As this statute makes absolutely clear, a person commits a federal ARPA violation when he knowingly transports, in interstate commerce, archaeological resources that have been excavated or removed in violation of any provision in effect under state or local law. Such predicate state law provisions may, therefore, include traditional property offenses (such as conversion or trespass), or they may include violations of statutory or regulatory schemes specifically designed to protect archaeological resources.

Despite ARPA's plain language to the effect that "any" state or local law or permit violation may serve as an ARPA predicate, Defendant Gerber insists, in lengthy and convoluted arguments, that the statute cannot mean what it says. Instead, he asks this Court to adopt a "limiting interpretation," Defendant's Memorandum in Support, at 9, to the effect that only those state and local laws, regulations, or permits involving schemes specifically designed to protect archaeological resources should be deemed to fall within the sweep of ARPA. It is easy to understand why Defendant Gerber

would insist on such an unusual interpretation: no comprehensive archaeological resource protection scheme existed under Indiana law until 1989, several months after the excavations charged in his own case.¹

In insisting that the government "has not the discretion" to "expand" ARPA to include violations of state trespass and conversion laws, Defendant's Memorandum in Support, at 20, the defendant simply turns logic on its head. It is the defendant, not the government, who would engraft "discretion" onto a statute whose plain and inclusive meaning is clear. The defendant would have the government (and, in the final analysis, federal courts) pick and choose which state and local laws sufficiently implicate "archaeological resource protection" concerns to qualify as ARPA predicates.

Indeed, one of the predicate violations in this very case illustrates the shortcomings of defendant's proposed gloss on the

¹Defendant's description of recent changes in Indiana law in the area of archaeological resources protection, Defendant's Memorandum in Support, at 12-13, is correct. Prior to January 1, 1989, Indiana's principal (but not only) provision affecting archaeological resources as such was I.C. § 14-3-3.4-7, which proscribed excavations without a permit only "within the boundaries of property owned or leased by the state . . .". After that date, a more comprehensive state law came into effect which required, *inter alia*, permits to conduct excavations of certain archaeological sites on private property as well. The excavations and removals of artifacts charged in this Indictment are alleged to have occurred on private property during June, July and August, 1988.

statute. The present Indictment charges as a predicate, among others, the violation of a state Department of Highways provision specifically providing that if "archaeological artifacts are encountered during excavation operations, the Contractor shall cease operations in the immediate vicinity and notify the Engineer." Indiana Department of Highways, Standard Specifications, Section 104.06 ("Rights in and Use of Materials Found on the Property"), cited in Indictment, at ¶ 5. The defendant does not favor us with an interpretation whether, under his amorphous "limiting interpretation" of ARPA, he would include this provision as one implicating "resource protection," and therefore eligible for use as an ARPA predicate.

In another assault on logic, this one worthy of a passage in Alice in Wonderland, Defendant Gerber suggests that "it would have been very simple, if this were the intent of Congress, to make clear that it meant [to include] violations of criminal statutes, property protection laws, etc. The statute would simply have said so . . .". Defendant's Memorandum in Support, at 18. One wonders how much "simpler" Congress could have been in its expression of its intent to include "any" such provision; it simply used the word "any." The defendant would have Congress provide an exhaustive listing of the myriad kinds of state statutes and regulations it meant by "any," but such an approach would hardly be a model of simplicity.

The fact is, of course, that the simpler approach to limiting the scope of a statute -- if that had been Congress' intent -- would have been simply to define its limitations. That is precisely what Congress did in the closely analogous provisions of the Lacey Act, which outlaw interstate trafficking in wildlife "taken" in violation of state laws or regulations. The pertinent provision of the Lacey Act reads as follows:

It is unlawful for any person --

. . . .

(2) to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce --

(A) any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any state. . . .

16 U.S.C. § 3372 (as amended, 1981). The Lacey Act then elaborates its definition of "law or regulation" as follows:

The terms "law," "treaty," "regulation," and "Indian tribal law" mean laws, treaties, regulations or Indian tribal laws which regulate the taking, possession, importation, exportation, transportation, or sale of fish or wildlife or plants.

16 U.S.C. § 3371(d) ("Definitions") (emphasis added).

ARPA, at Section 470aa of Title 16, United States Code, sets forth a number of definitions of terms used throughout its statutory scheme. Nowhere among those terms, however -- or anywhere else -- does there appear any such restrictive definition

of "provisions in effect under state or local law" as Congress chose to employ in the parallel provision of the Lacey Act.

The restrictive language employed in the Lacey Act was simple, and Congress by that Act demonstrated that it knew how to employ it where such was its intent. Congress employed no such language, and harbored no such intent, with regard to ARPA.

The defendant is able to cite no passage from the concededly sparse legislative history of section 470ee(c) to support his insistence upon a congressional intent to restrict ARPA only to certain kinds of state and local provisions. The House Report on the bill that became ARPA says only this with regard to prohibited acts:

[ARPA] prohibits on public or Indian lands the excavation etc. of archaeological resources except in accordance with permits or exemptions; prohibits dealing in those resources which are excavated or removed illegally, and precludes the sale and transportation in interstate or foreign commerce when the resources are involved in violations of state or local law.

H. Rep. 96-311, 1979 U.S. Code Cong. & Ad. News, at 1713 (emphasis added). Nowhere in this passage does Congress evince an intent to prohibit trafficking only in those resources "involved in" violations of state or local archaeological resources protection laws.

Nor are the following remarks of Senator Domenici, cited by the defendant, to the contrary:

This proposed federal act contains several features which make it a good law which both federal and state officials can use to protect archaeological sites.

If enacted, the law would dovetail with existing state laws, such as New Mexico's, so that offenders could not skip to another state to avoid prosecution.

S. 10834, cited in Defendant's Memorandum in Support, at 10. Here a single senator, remarking about the bill, cites as a favorable example the fact that the statute would "dovetail" with a particular state law. Presumably, Senator Domenici is referring to a particular state law he believed to be topical -- a New Mexican archaeological resources protection law -- though this is nowhere stated. In no way does the senator suggest that by "existing state laws" he (let alone Congress) meant that ARPA would only incorporate those laws similar to a resources protection law adopted in New Mexico.²

The defendant wonders aloud how ARPA could have been considered to be "groundbreaking" if it could be read to incorporate the more mundane features of existing state law, such as theft, conversion or trespass. After all, he suggests, "We

²Defendant's argument drawing on Senator Domenici's comment is reminiscent of similar arguments raised shortly after the passage of the federal RICO statute. The legislative history of RICO was littered with observations by individual congressmen concerned about "legitimate" businesses being infiltrated by organized crime. This prompted resourceful defense attorneys to claim that the scope of the RICO statute, despite its plain meaning, should be restricted to cases where "legitimate" enterprises had been so corrupted. This argument has been rejected. See, e.g., United States v. Mazzi, 501 F. Supp. 340, 342 (E.D. Pa. 1980).

already have the National Stolen Property Act" [18 U.S.C. § 2314]. Defendant's Memorandum in Support, at 11. "Groundbreaking" or not, the congressional committee that drafted the ARPA legislation was aware that in some cases, there would be overlap with more traditional criminal statutes:

The Committee is aware that these penalties overlap with more general statutes and regulations, and there is no intent to preclude action under those general provisions relating to the protection of federal property under appropriate circumstances.

H. Rep. 96-311, 1979 U.S. Code Cong. & Ad. News, at 1714. While this particular passage clearly refers to ARPA's possible overlap with general federal criminal statutes where archaeological resources are removed from public lands, there is no reason to believe that Congress would have precluded overlap with general state criminal statutes where archaeological resources are removed from private or state-owned lands.³

Because the plain meaning of ARPA clearly encompasses violations of any provision or permit in effect under state or local law, and in the absence of any evidence of congressional intent otherwise to restrict the Act's meaning, the instant Indictment properly states an offense against the United States,

³Further, Congress might well have questioned whether, for example, archaeological resources excavated in violation of a permit were "goods" that had been "stolen" within the meaning of the older Act.

and withstands defendant's motion to dismiss on grounds of statutory construction.

III. THE "RULE OF LENITY" IS INAPPLICABLE IN THIS CASE.

Defendant Gerber contends that even if his argument regarding the scope of ARPA's incorporation of state law is not persuasive, there is sufficient ambiguity to trigger the "rule of lenity," whereby ambiguous statutory provisions should be construed in favor of criminal defendants. See United States v. Batchelder, 442 U.S. 114, 121 (1979). Because the statute is unambiguous in its incorporation of "any" state or local provision, this rule of construction does not apply.

The mere possibility of articulating a narrower construction of a statute, where the statute is nonetheless plain on its face, is not sufficient to trigger lenity. Moskal v. United States, 111 S. Ct. 461, 465 (1990); United States v. Helmy, No. 89-10659, slip op. (9th Cir. Oct. 28, 1991). While the defendant has articulated a novel "limiting interpretation" of ARPA, that interpretation is untenable and does nothing to create ambiguity as to the plain terms of that law.

Defendant also cites Jerome v. United States, 318 U.S. 101 (1943), for the proposition that federal courts should be reluctant to expand the scope of federal statutes to incorporate provisions of state law. But Jerome involved the question of whether or not

the federal Bank Robbery Act, which proscribed entering a bank with intent to commit "any felony," was intended to include felonies under state law. In light of the ambiguity as to whether Congress intend to incorporate state-law violations at all, the Court strictly construed the statute against state-law incorporation.

The Jaxome case, therefore, is inapposite here, where Congress under ARPA unambiguously intended to incorporate state law violations into a federal statute, and to do so inclusively.

IV. THE ARCHAEOLOGICAL RESOURCES PROTECTION ACT [16 U.S.C. §§ 470AA ET SEQ.] PLACED THE DEFENDANT ON NOTICE AS TO WHAT CONDUCT WAS PROHIBITED BY ITS TERMS, AND THEREFORE WAS NOT VOID FOR VAGUENESS UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMEND-
MENT TO THE UNITED STATES CONSTITUTION

The Defendant has also asked this Court to reconsider its previous ruling, in the related case of United States v. John William Way, Cause No. EV 90-32-CR, that ARPA is not constitutionally deficient on vagueness grounds. The Defendant has even suggested that the government in the Way case "steered" this Court's attention from the facial vagueness challenge and, in some fashion, "[led] the Court into error." Defendant's Memorandum in Support, at 21.

Defendant Gerber underestimates the Court's perspicacity, and grossly inflates his own. It is the Defendant, not the Court, who is confused as to the meaning and standard governing vagueness challenges to federal statutes.

Gerber's confusion is illustrated by his very framing of the asserted "vagueness" issue. He contends that his "limiting interpretation" is "required to avoid unconstitutionality for vagueness," Defendant's Memorandum in Support, at 14 (emphasis added), and takes issue with the government's position because it is "the broadest application" of the statute. Defendant's Memorandum in Support, at 18 (emphasis added). Adopting this "broad, layered interpretation," the defendant maintains, renders the statute "vague." Defendant's Memorandum in Support, at 18.

In short, the defendant's concern is clearly about the breadth, not the asserted "vagueness," of the ARPA statute's incorporation of state and local law. His is an overbreadth, not a vagueness challenge. And as the Court correctly pointed out in its ruling in Way, "To be overbroad the statute must reach to a substantial amount of constitutionally protected conduct." United States v. Way, No. EV 90-32-CR, slip op. at 8 (citing United States v. Austin, 902 F.2d 743 (9th Cir. 1990)).

By seeking simply to re-christen his overbreadth challenge as a "vagueness" challenge, Defendant Gerber attempts to avoid

these court holdings, and the reality that he cannot point to any constitutionally protected conduct that may be reached by the provision in question. Indeed, in both the Austin case and in United States v. Smyer, 596 F.2d 939 (10th Cir. 1979), the courts have found that the excavation of native American archaeological sites is not constitutionally protected conduct, even where such excavation is motivated by "curiosity" or in the asserted interest of "academic freedom." Austin, supra, 902 F.2d at 744-45; Smyer, supra, 596 F.2d at 941.

The "void-for-vagueness" doctrine requires only that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited, and in a manner that does not encourage arbitrary and discriminatory enforcement. Kolender v. Lawson, 461 U.S. 352, 357 (1983). The courts' traditional concerns in vagueness cases have been with statutes containing terms of degree, that create no cognizable "standard" for what may or may not be prohibited. Such statutes invite police, in deciding on their own whether such amorphous standards have been violated, to make arrests based on unlawful or discriminatory considerations.

These concerns are echoed in a long line of vagueness cases dating back for many decades. In United States v. Cohen Grocery, 255 U.S. 81 (1921), cited by defendant in support of his

"vagueness" challenge to ARPA, the Supreme Court invalidated a federal statute imposing a criminal penalty upon any person "who should make any unjust or unreasonable rate or charge in handling or dealing with any necessities." The Court held that the terms "unjust" and "unreasonable" were insufficient to set standards for violation of a criminal statute.

In Connally v. General Construction Co., 269 U.S. 385 (1926), also relied upon by the defendant, the Court invalidated an Oklahoma law requiring the payment of "the current rate of wages . . . in the locality." Viewing that language, the Court observed that the "locality" could not be sufficiently defined geographically, and that the "current rate of wages" was not a unitary concept, but a "progressive scale of minimum, maximum and intermediate amounts varying from time to time and dependent upon the class of work done, efficiency of the workmen, etc."

The California criminal statute struck down in Kolender, supra, required persons "who loiter or wander on the streets" to provide "credible and reliable" identification. The Court could find no cognizable standard for what could be considered "credible and reliable," and suspected that the statute could be used to vest complete discretion in the hands of the police -- discretion that could be used to abridge First Amendment liberties such as freedom of movement. Id. at 358.

Examples of successful vagueness challenges could be multiplied to the same effect. See, e.g., Gentile v. State Bar of Nevada, 115 L. Ed. 2d 888, 906 (1991) (invalidating bar disciplinary rule allowing defense lawyer to state only "without elaboration . . . the general nature of the defense"); Cox v. Louisiana, 379 U.S. 536 (1965) (Louisiana breach of the peace ordinance outlawing conduct intended "to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet"). All of these successful vagueness challenges share characteristics of standardless terminology susceptible to distinctions of degree, most often in areas (particularly under the more recent case law) wherein such amorphous terminology could be expected to chill constitutionally protected conduct such as the right to move freely, to speak freely, and to assemble.

None of these characteristics are shared by the present case. The prohibitions contained in ARPA are binary and knowable. The statute asks only the question whether the artifacts were -- or were not -- excavated or removed in violation of provisions or permits in effect under state and local law. That is a simple, "either/or" proposition.

As a result of its dependence on state law, ARPA's prohibitions will vary with the judgments of fifty state legislatures. However, as long as the underlying state violations are defined with sufficient clarity, a federal statute based on

such provisions withstands attack. United States v. Bryant, 716 F.2d 1091, 1095 (6th Cir. 1983). In Bryant, SUPRA, a Lacey Act defendant claimed that the federal statute was "vague", in that its provisions could vary with the "whim" of fifty state legislatures. The Bryant court held that as long as the underlying state statutes were themselves constitutionally sound, a federal statute incorporating them would also withstand a vagueness challenge. The underlying provisions in this case -- trespass, conversion, and highway regulations concerning the treatment of archaeological sites -- are certainly themselves sufficiently clear to place the defendant on notice of what conduct was prohibited. Indeed, the defendant in this case makes no challenge to the constitutional soundness of those state provisions. Therefore, the federal statute incorporating those provisions must also be upheld. See also United States v. Turley, 352 U.S. 407, 417 (1957) (holding that use of the term "stolen" in 18 U.S.C. § 2312 [Interstate Transportation of Stolen Motor Vehicles] was not "vague").

Because this provision of ARPA, on its face, sufficiently placed the defendant on notice of what conduct it prohibited, this Court's previous ruling with regard to a similar vagueness challenge was correct. Defendant Gerber's arguments contribute nothing further to the analysis, and his challenge on similar grounds should be rejected.

V. THE ARCHAEOLOGICAL RESOURCES PROTECTION ACT
[16 U.S.C. §§ 470EE ET SEQ.], IN ADDING POTENTIAL
CIVIL PENALTIES FOR UNLAWFUL REMOVAL OF ARCHAEO-
LOGICAL RESOURCES FROM PUBLIC LANDS, DID NOT
IMPLICATE EQUAL PROTECTION CONCERNS UNDER THE
FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

For persons who violate ARPA by unlawfully removing archaeological resources from public lands, Title 16 U.S.C. § 470ff provides for the assessment of civil monetary penalties by the Federal Land Manager concerned. The Land Manager is charged with the responsibility of assessing a penalty that will reflect the archaeological or commercial value of the site, and the costs of restoration or repair.

Defendant Gerber complains that because he is not also eligible for civil penalties, he is the victim of an "arbitrary classification" in violation of the equal protection concerns embodied in the Fifth Amendment to the United States Constitution. His argument is that if civil penalties were applicable in his case, the government might have elected to proceed civilly rather than presenting his case to a Grand Jury.

As a threshold matter, Gerber's argument is speculative. The civil penalty provisions of ARPA for those who loot on public land are in addition to, not in lieu of, criminal prosecution.

Thus, Gerber's entire argument turns on speculation that the government, presented with the same set of facts but having civil penalties as an option, would have acted differently. Moreover, Defendant Gerber cites no authority for the novel proposition that he has a constitutional right to be considered for civil penalties, where a Grand Jury has in any case found probable cause that he committed a criminal offense.

The only case cited by Gerber in support of his position is Bolling v. Sharpe, 347 U.S. 497 (1954), which was the companion federal case to Brown v. Board of Education, 347 U.S. 483 (1954). The Bolling decision, of course, desegregated public schools in the District of Columbia, and therefore applied a standard of "strict scrutiny" to a "suspect classification" based on race.

Bolling is not this case. Defendant cites no fundamental right that has been abridged by the fact that he is not subject to ARPA's civil penalty provisions. Nor is the legislative distinction between those who loot on public lands and those who loot at other locations based on any "suspect classification."

When social and economic legislation enacted by Congress is challenged on equal protection grounds, the "rational-basis" standard is the appropriate standard of judicial review. That is, if the classification being challenged has some "reasonable basis," it does not offend the Constitution merely because the

classification is not made with mathematical nicety, or because in practice it may result in differing treatment. United States Railroad Retirement Board v. Fritz, 449 U.S. 166, 174 (1980).

The ARPA subsection authorizing Federal Land Managers to impose civil penalties for archaeological looting of public lands is based on entirely rational considerations. Federal Land Managers are in the best position to enforce, monetarily, violations of permits to excavate archaeological resources on the lands they manage. Because of their intimate knowledge of the lands in question, they are also in the best position to assess the monetary impacts of looting activity. Conversely, they are not in a position to undertake this kind of enforcement, or to make these quantitative judgments, where Indian lands or private lands are involved.

That this is the rational basis for the civil penalty provision is reflected in the House Report on the bill that became ARPA. Commenting on the civil penalty provision, that Report states:

This section provides civil penalties for those who violate regulations or permits issued under this Act This section is intended to give Federal Land Managers a strong enforcement authority, short of criminal sanctions, by which illegal activities on the public lands may be deterred.

H. Rep. 96-311, 1979 U.S. Code Cong. & Ad. News, at 1714 (emphasis added).

Because Defendant Gerber's claims are speculative, and implicate no fundamental right or suspect classification, and further because the legislative distinction of which he complains has a reasonable legislative basis, his challenge to ARPA on equal protection grounds must fail.

VI. THE INSTANT PROSECUTION WAS TIMELY FILED WITHIN
THE APPLICABLE LIMITATIONS PERIOD

Finally, the defendant states that he "wishes to preserve an argument" that this prosecution is void for not having been brought within the statute of limitations period. Defendant's Memorandum in Support, at 22. Because such a contention should be raised in a motion to dismiss before trial, Federal Rules of Criminal Procedure, Rule 12(b)(1), the government will construe defendant's phrasing as a motion to dismiss on limitations grounds, and will address it here on its merits.

The Indictment charges that Defendant Gerber and others excavated and removed archaeological resources, in violation of certain provisions of state law, during June, July, and August, 1988. The indictment further charges that Gerber and his confederates transported those resources in interstate commerce -- in violation of federal law -- during those months and continuing

until in or about July, 1989. This federal prosecution was instituted by a Grand Jury Indictment filed on July 12, 1991 -- two (2) years after the ending date of the conspiracy, and approximately three (3) years after the initial excavation of the archaeological resources in question.

The general statute of limitations applicable to non-capital federal offenses, including ARPA offenses, is five (5) years. Title 18, United States Code, Section 3282. The gravamen of the ARPA offense is the knowing interstate transportation of unlawfully excavated archaeological resources. See Kramer v. United States, 408 F.2d 837, 839 (8th Cir. 1969) (gravamen of Interstate Transportation of Stolen Vehicle offense is in "transporting or causing to be transported"). Where, as here, such transportation occurred within the five-year federal limitations period, the prosecution is properly brought.

Defendant argues, nonetheless, that this Court should apply the two-year state statute of limitations applicable to misdemeanor offenses, since the Indictment alleges that the artifacts transported in violation of federal law were originally excavated in violation of state misdemeanor trespass and conversion laws.

Such arguments are nothing new in the context of the many federal statutes which incorporate, as predicates, some provision of state or local law. They have often been raised, and always

rejected. Predictably, the defendant does not cite a single case where such an argument has ever been accepted.

Once again, the Lacey Act, which prohibits interstate trafficking in wildlife taken in violation of state law, provides an apt analogy. In United States v. Thomas, 887 F.2d 1341 (9th Cir. 1989), a Montana hunting guide was charged with conspiring to assist hunters in pursuing big game without a license, and then transporting the unlawfully taken animal carcasses in interstate commerce. The underlying violation -- hunting big game without a license -- was a violation of Montana state law. That law carried a one-year statute of limitations.

The federal case was brought outside the state statute of limitations period, and the defendant claimed that the prosecution was therefore time-barred. The Thomas court rejected this contention, noting:

Although the underlying violation here involves a state statute, the charges were brought by federal authorities in federal court pursuant to federal statutory law. . . . In fact the [Lacey] Act provides penalties for violations that may exceed the penalties available under state law. Thus, the statute creates a new violation arising out of the same conduct as that violating state law.

* * * *

At bottom, this case turns on the fact that Thomas was charged with violating a federal criminal statute. Although the statute does not in itself contain a statute of limitations,

Congress has provided for a "catch-all" statute of limitations of five years, 18 U.S.C. § 3282, applicable to those statutes that do not specifically define a limitations period. The Lacey Act is exactly that type of statute.

Id., at 1349. ARPA is also "exactly that type of statute," and because it is a federal statute, the federal five-year limitations period applies.

Examples of the failure of the very type of argument raised by Defendant Gerber, in the context of federal statutes incorporating state law provisions, could be multiplied. See, e.g., United States v. Steele, 685 F.2d 793, 807 (3rd Cir. 1982) (in Interstate Travel in Aid of Racketeering prosecution, "it must be made clear that 18 U.S.C. § 1952 charges a federal crime, and the relevant statute of limitations must be found in federal law") (emphasis added); United States v. Forsythe, 560 F.2d 1127 (3rd Cir. 1977) (in RICO prosecution, limitations periods for state predicate offenses do not apply); United States v. Revel, 493 F.2d 1 (5th Cir. 1974) (in prosecution under 18 U.S.C. § 1955, state limitations periods for predicate state gambling violations do not apply); accord., United States v. Carone, 452 F.2d 274 (7th Cir. 1971), cert. denied, 405 U.S. 964 (1972) (Travel Act).

Defendant's utterly unsupported assertion that this prosecution is time-barred should fare no better than similar arguments made in the above-cited cases. The federal statute of

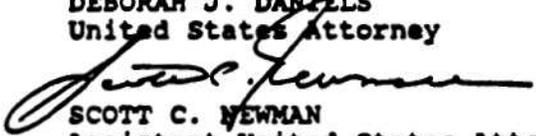
limitations should be applied to the present federal prosecution. By that statute, the instant prosecution is timely brought.

WHEREFORE, for all of the foregoing reasons, the defendant's Motion to Dismiss the Indictment herein should be, in all respects, overruled.

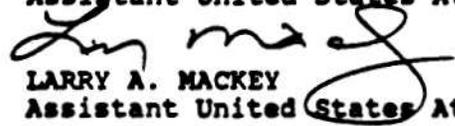
Respectfully submitted,

DEBORAH J. DANIELS
United States Attorney

By:


SCOTT C. NEWMAN
Assistant United States Attorney

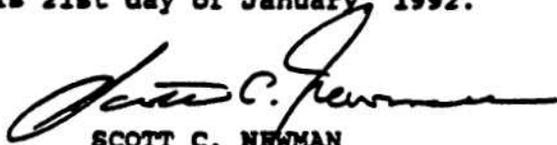
By:


LARRY A. MACKEY
Assistant United States Attorney

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing GOVERNMENT'S RESPONSE AND MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS INDICTMENT has been served upon counsel of record, by placing same in the United States Mail, First-Class Postage prepaid and addressed to Jeffery L. Lantz, Attorney at Law, P.O. Box 1087,

525 Sycamore, Evansville, Indiana 47706, and to J.J. Paul, III,
Attorney at Law, Ober, Symmes, Cardwell, Voyles & Zahn, 300
Consolidated Building, 115 North Pennsylvania Street, Indianapolis,
Indiana 46204, this 21st day of January 1992.



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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.) CAUSE NO. EV 91-19-CR
)
 ARTHUR JOSEPH GERBER,)
)
 Defendant.)

ORDER

This matter having come before the court on Gerber's Motion to Dismiss and eighteen other pre-trial motions, and this Court being duly advised and of the opinion that the Motion to Dismiss should be denied and the pre-trial motions should be granted in part and denied in part, it is

ORDERED that the Defendant's Motion to Dismiss is DENIED;

IT IS FURTHER ORDERED that the Motion for Disclosure of Bad Acts or Convictions of the Defendant, Motion for Bill of Particulars, Motion for *In Camera* Inspection of Co-Defendants' Statements, Defendant's Discovery Motion, Defendant's Motion for Production of Grand Jury Minutes and Information, Motion for Disclosure of Grand Jury Procedures, Motion for Disclosure of Means of Identification, Motion for Information Regarding Government's Use of Informants, Motion for Disclosure and Production of Evidence that is Favorable to the Accused, Defendant's Motion for Discovery of Statements of Co-Defendant's and Alleged Co-Conspirators, Motion to Interview Co-Conspirator government Witnesses, Motion for Notice of Intention to Use Evidence, Motion

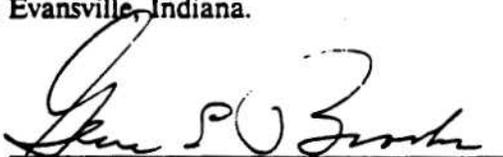
to Interview Government Witnesses, Motion for Exculpatory Evidence, and the Motion to Disclose the Identities of Informants and Sources are DENIED;

IT IS FURTHER ORDERED that the Motion for Preservation of Tapes and Notes is GRANTED to the extent that it concerns the preservation of various evidence, documents and other material related to this case which is in the custody or control of the United States, but to the extent that it relates to the disclosure of information concerning witnesses which will be unavailable it is DENIED;

IT IS FURTHER ORDERED that the Motion for Leave to File Additional Motions is GRANTED and Gerber is granted leave to file supplementary motions and memoranda relating to information provided by the United States within ten days after receipt of such material;

IT IS FURTHER ORDERED that Defendant's Motion for Pre-Trial Determination of the Admissibility of Co-Conspirators' Statements is GRANTED and the United States is ordered to submit its proffer at its earliest convenience.

Done this 25th day of January 1992 in Evansville, Indiana.



GENE E. BROOKS, CHIEF JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

Distribution to Counsel of Record

MEMORANDUM

This matter comes before the Court on Arthur Joseph Gerber's Motion to Dismiss and eighteen other pre-trial motions. A seven count indictment was filed against Gerber on 11 July 1991 charging him with conspiracy to violate and violation of the Archaeological Resources Protection Act (ARPA), 16 U.S.C. § 470aa *et seq.*

MOTION TO DISMISS

Gerber presents seven grounds for dismissal.

Inadequacy of the underlying state or local violations.

Gerber argues all the indictments should be dismissed because they fail to allege any offense cognizable under ARPA. Gerber argues 16 U.S.C. § 470ee(c) should be interpreted to require a violation of a state or local resource protection law and that violation of Indiana criminal trespass and conversion laws are inadequate to satisfy the requirements of ARPA. 16 U.S.C. § 470ee(c) states:

(c) No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange, in interstate or foreign commerce, any archaeological resource excavated, removed, sold, purchased, exchanged, transported, or received in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law.

Though Gerber devotes many pages of his brief discussing the legislative history of ARPA, it is unnecessary to examine the legislative history since the statute is unambiguous. *Burlington N.R.R. v. Okla. Tax Comm'n*, 481 U.S. 454, 461 (1987) ("Unless exceptional circumstances dictate otherwise, '[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete.>"). Gerber argues the statute is ambiguous because § 470kk(c) states,

"[n]othing in this Act shall be construed . . . to affect the lawful recovery, collection, or sale of archaeological resources from land other than public land or Indian land." Gerber points out that the indictment does not allege public or Indian land was involved, but fails to note that the indictment does allege that his collection was unlawful. The exemption of § 470kk(c) only speaks to lawful collection on non-public, non-Indian land, not unlawful recovery, collection, or sale. Section 470kk(c) does not create an ambiguity in the statute.

Gerber further argues "this legislation could hardly be considered groundbreaking if it were simply meant to again punish stolen property put into the stream of interstate commerce." Gerber Brief in Support of Motion to Dismiss at 11. It is of no relevance whether or not this statute is groundbreaking. Congress enacted this legislation which in part defines a criminal activity and proscribes its punishment. The statute's alleged failure to be groundbreaking does not create an ambiguity. Gerber's argument here ignores the statute's focus on archaeological resources. Even if the statute "simply meant to again punish stolen property put into the stream of interstate commerce," it still defines a unique, unambiguous crime based on the nature of the stolen property being an archaeological resource.

ARPA, 16 U.S.C. § 470ee(c), does not require, as Gerber argues, the violation of a state or local resource protection law; rather, it states a "violation of *any* provision, rule, regulation, ordinance, or permit in effect under State or local law." (Emphasis added). There is no ambiguity in the wording of the statute and therefore no exploration of the legislative history is warranted. Violation of the Indiana criminal trespass and conversion

laws are adequate to satisfy the requirements of § 470ee(c) specifying a "violation of any . . . State or local law."

Having decided that the Indiana criminal trespass and conversion laws satisfy the statute, it is unnecessary to address Gerber's arguments concerning Indiana's resource protection laws.

Void for vagueness.

Gerber next argues all the indictments should be dismissed because ARPA is unconstitutionally vague. "It is Gerber's assertion that 470ee(c) fails to give notice of the proscription of any definite act or acts, and is susceptible to more than one construction . . ." Gerber Brief in Support of Motion to Dismiss at 18. Gerber cites to *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) and its description of the vagueness doctrine as "the requirement that a legislature establish minimal guidelines to govern law enforcement." *Kolender* goes on to state "[w]here the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" In this case, the statute's proscription against interstate transactions involving archaeological resources procured "in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law" makes clear what conduct is prohibited and Gerber has not made any showing how the statute is unconstitutionally vague such that policemen, prosecutors, or juries could pursue their personal predilections. Gerber's desire for Congress to have specifically mentioned criminal statutes or property protection laws would have contributed no more to the meaning of the

statute than does the word "any" to modify the words "provision, rule, regulation, ordinance, or permit in effect."

Gerber's argument that the phrase "any provision, rule regulation ordinance, or permit" is borrowed from § 470ee(b) is equally meritless. To the extent that the phrase is borrowed, the word "any" in § 470ee(b) appears to also include criminal statutes and property protection laws. Therefore there is no conflict between the two uses of the phrase. Nevertheless, § 470ee(c) is not vague.

The rule of lenity.

Gerber argues the ambiguities in the statute require the application of the rule of lenity. Since this Court has already determined the statute is not vague, it is unnecessary to address the applicability of the rule of lenity.

The applicability of ARPA to non-public, non-Indian lands.

Gerber argues ARPA is not applicable to non-public, non-Indian lands. Gerber does not present any argument on this point beyond its mere assertion for the purposes of preserving the issue, therefore this Court will not address it other than to reaffirm its position as stated in the order of 25 October 1991 in *United States v. May*, EV 91-32-CR.

The lack of a requirement of knowledge.

Gerber argues "that without requiring knowledge that the contested artifacts were excavated or removed in violation of ARPA the application of the statute is unconstitutionally vague and violative of due process of the law." Gerber Brief in Support of Motion to Dismiss at 21 (parenthetical omitted). Gerber does not present any argument on this point beyond its mere assertion for the purposes of preserving the issue, therefore

this Court will not address it other than to reaffirm its position as stated in the order of 25 October 1991 in *United States v. May*, EV 91-32-CR.

Equal Protection

Gerber argues that ARPA creates an arbitrary classification of those who illegally procure an archaeological resource from public or Indian land and those who illegally procure such resource from other land by providing for civil penalties for the former but not the latter. Providing for potentially additional civil penalties by the Federal land manager concerned is not an arbitrary classification. There is a rational basis for providing Federal land managers the power to impose an alternate or additional punishment for violations occurring within their area of control. Such control strengthens the authority of Federal land managers in their authority over their territory and over the permits they issue. Gerber was not denied equal protection by not having a Federal land manager with authority over the land from which the indictment charges he procured archaeological resources.

Statute of limitation for the underlying state law offense.

Gerber argues the expiration of Indiana's two year statute of limitation for the underlying state law offenses charged in the indictment bars their use by the prosecution. Gerber's argument is not well founded. Where a criminal defendant is charged with violation of a federal statute and the violation of a state offense is an element of that federal offense, the only applicable statute of limitation is federal, not state. *United States v. Thomas*, 887 F.2d 1341 (9th Cir. 1989). Indiana's statute of limitation for the underlying offense is not relevant to this prosecution.

The Motion to Dismiss is DENIED.

MOTION FOR LEAVE TO FILE ADDITIONAL MOTIONS

Gerber requests leave to file supplementary motions within ten days of his receipt of discovery material provided by the United States. There being no objection by the United States, the motion is GRANTED.

MOTION FOR DISCLOSURE OF BAD ACTS OR CONVICTIONS OF THE DEFENDANT

In reliance on the good faith of the United States in its brief in response to this motion by Gerber, this motion is moot since all relevant information relating to this request has, is, or will be provided in accordance with the discovery procedures mutually agreed to by Gerber and the United States. The motion is DENIED.

MOTION FOR BILL OF PARTICULARS

Gerber moves this Court to order a bill of particulars be filed by the United States. A bill of particulars is not warranted when "the indictment . . . sufficiently apprises the defendant of the charges to enable him to prepare for trial." *United States v. Serola*, 767 F.2d 364, 37 (7th Cir. 1985) (ellipsis in original). Here the indictment is sufficient for Gerber to prepare for trial; therefore, the motion is DENIED.

MOTION FOR *IN CAMERA* INSPECTION OF CO-DEFENDANTS' STATEMENTS

Gerber moves for an *in camera* inspection of co-defendant's statements so that he may "determine the propriety of defendant's motion to sever." Gerber Motion at 1. Since

Gerber has no co-defendant's from whom to be severed at trial, he has no need to determine the propriety of a motion to sever. The motion is DENIED.

DEFENDANT'S DISCOVERY MOTION

Gerber seeks disclosure of various information from the United States. To the extent that this motion requests disclosure required by applicable law, this motion is moot because, in reliance on the good faith of the United States in its brief in response to this motion by Gerber, all relevant information relating to this request has, is, or will be provided in accordance with the discovery procedures mutually agreed to by Gerber and the United States. To the extent that this motion requests disclosure beyond applicable law, the United States is not obligated to provide such discovery. The motion is DENIED.

DEFENDANT'S MOTION FOR PRODUCTION OF GRAND JURY MINUTES AND INFORMATION

Gerber moves for disclosure of grand jury information. To the extent that this motion requests disclosure required by applicable law, this motion is moot because, in reliance on the good faith of the United States in its brief in response to this motion by Gerber, all relevant information relating to this request has, is, or will be provided in accordance with the discovery procedures mutually agreed to by Gerber and the United States. To the extent that this motion requests disclosure beyond that required by applicable law, Gerber must make a showing of particularized need. *United States v. Peters*, 791 F.2d 1270 (7th Cir. 1986). Though Gerber has listed five reasons for seeking the grand jury information, he has not stated any basis for believing that any of these violations have

occurred and therefore has failed to present any particularized need. The motion is DENIED.

MOTION FOR DISCLOSURE OF GRAND JURY PROCEDURES

Gerber moves for disclosure of grand jury information. To the extent that this motion requests disclosure required by applicable law, this motion is moot because, in reliance on the good faith of the United States in its brief in response to this motion by Gerber, all relevant information relating to this request has, is, or will be provided in accordance with the discovery procedures mutually agreed to by Gerber and the United States. To the extent that this motion requests disclosure beyond that required by applicable law, Gerber must make a showing of particularized need. *United States v. Peters*, 791 F.2d 1270 (7th Cir. 1986). Gerber has not presented any particularized need. The motion is DENIED.

MOTION FOR DISCLOSURE OF MEANS OF IDENTIFICATION

In reliance on the good faith of the United States in its brief in response to this motion by Gerber, this motion is moot since all relevant information relating to this request has, is, or will be provided in accordance with the discovery procedures mutually agreed to by Gerber and the United States. The motion is DENIED.

MOTION FOR INFORMATION REGARDING GOVERNMENT'S USE OF INFORMANTS

Gerber moves for disclosure of information regarding informants. In reliance on the good faith of the United States in its brief in response to this motion by Gerber, this motion is moot since the United States has asserted there were no informants involved with this investigation. The motion is DENIED.

DEFENDANT'S MOTION FOR PRE-TRIAL DETERMINATION OF THE ADMISSIBILITY OF CO-CONSPIRATORS' STATEMENTS

Gerber moves for a pre-trial determination of the admissibility of his alleged co-conspirators' statements. The United States having presented no objection to the motion, the motion is GRANTED. To permit this Court sufficient time to consider the admissibility of such statements, the United States is ordered to submit its proffer at its earliest convenience.

MOTION FOR PRESERVATION OF TAPES AND NOTES

Gerber presents two requests in this motion. His first request is the preservation of various evidence, documents and other material related to this case which is in the custody or control of the United States. The United States having presented no objection to this part of the motion, it is GRANTED.

The second request Gerber makes in this motion is for disclosure of information concerning witnesses which will be unavailable. To the extent that this part of the motion

requests disclosure required by applicable law, this motion is moot because, in reliance on the good faith of the United States as stated generally throughout its brief and specifically in response to the specific motions relating to the disclosure of information concerning witnesses, all relevant information relating to this request has, is, or will be provided in accordance with the discovery procedures mutually agreed to by Gerber and the United States. To the extent that this motion requests disclosure beyond applicable law, the United States is not obligated to provide such discovery. The second part of the motion is DENIED.

The motion is GRANTED IN PART and DENIED IN PART.

MOTION FOR DISCLOSURE AND PRODUCTION OF EVIDENCE THAT IS FAVORABLE TO THE ACCUSED

To the extent that this motion requests disclosure required by applicable law, this motion is moot because, in reliance on the good faith of the United States in its brief in response to this motion by Gerber, all relevant information relating to this request has, is, or will be provided in accordance with the discovery procedures mutually agreed to by Gerber and the United States. To the extent that this motion requests disclosure beyond applicable law, the United States is not obligated to provide such discovery. The motion is DENIED.

DEFENDANTS MOTION FOR DISCOVERY OF STATEMENTS OF CO-DEFENDANTS AND ALLEGED CO-CONSPIRATORS

Gerber requests permission to copy or inspect relevant documented statements made by co-defendants or co-conspirators. 18 U.S.C. § 3500 provides that, "no statement or report in the possession of the United States which was made by a Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case." Section 3500 prohibits this Court from granting the relief sought by Gerber. The motion is DENIED.

MOTION TO INTERVIEW CO-CONSPIRATOR GOVERNMENT WITNESSES

Gerber moves to interview co-conspirator government witnesses. A criminal defendant is not entitled to an interview with potential government witnesses. *United States v. Cutler*, 806 F.2d 933 (9th Cir. 1986). The motion is DENIED.

MOTION FOR NOTICE OF INTENTION TO USE EVIDENCE

To the extent that this motion requests disclosure required by applicable law, this motion is moot because, in reliance on the good faith of the United States in its brief in response to this motion by Gerber, all relevant information relating to this request has, is, or will be provided in accordance with the discovery procedures mutually agreed to by Gerber and the United States. To the extent that this motion requests disclosure beyond applicable law, the United States is not obligated to provide such discovery. The motion is DENIED.

MOTION TO INTERVIEW GOVERNMENT WITNESSES

Gerber moves to interview "all eyewitnesses to the acts and transactions alleged in Counts One through Seven inclusive upon whom the Government intends to rely at trial and for whom the Government claims in [sic] informant's privilege." In reliance on the good faith of the United States in its brief in response to this motion by Gerber, this motion is moot since the United States has asserted there are no such persons. The motion is DENIED.

MOTION FOR EXCULPATORY EVIDENCE

Gerber notes in his memorandum in support of this motion that it was filed because the United States had not provided discovery information prior to the deadline for filing these motions. Nevertheless, to the extent that this motion requests disclosure required by applicable law, this motion is moot because, in reliance on the good faith of the United States in its brief in response to this motion by Gerber, all relevant information relating to this request has, is, or will be provided in accordance with the discovery procedures mutually agreed to by Gerber and the United States. To the extent that this motion requests disclosure beyond applicable law, the United States is not obligated to provide such discovery. The motion is DENIED.

MOTION TO DISCLOSE THE IDENTITIES OF INFORMANTS AND SOURCES

Gerber moves for disclosure of information regarding informants. In reliance on the good faith of the United States in its brief in response to this motion by Gerber, this motion

is moot since the United States has asserted there were no informants involved with this investigation. The motion is DENIED.

IT IS SO ORDERED this 28th day of January 1992 in Evansville, Indiana.



GENE E. BROOKS, CHIEF JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

Distribution to Counsel of Record