

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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U.S. ATTORNEY
EUGENE, ORE.

UNITED STATES OF AMERICA,)
)
Plaintiff-Appellee,)
)
v.)
)
BRADLEY OWEN AUSTIN,)
)
Defendant-Appellant.)

CA No. 88-3300

USDC No. 88-60004

APPELLANT'S OPENING BRIEF

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STATEMENT OF ISSUES PRESENTED

I. WHETHER THE TRIAL COURT ERRED IN RULING THAT THE ARCHAEOLOGICAL RESOURCE PROTECTION ACT IS CONSTITUTIONAL AND NOT VOID FOR VAGUENESS?

II. WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO DISMISS THE SECOND SUPERCEDING INDICTMENT FOR PROSECUTORIAL VINDICTIVENESS?

STATEMENT OF THE CASE

Jurisdiction

The District Court has subject matter jurisdiction to hear criminal cases pursuant to 18 U.S.C. §3231.

Appealability

The judgment of conviction pursuant to a stipulated facts trial is a final decision of the District Court and is therefore appealable pursuant to 28 U.S.C. §1291.

Timeliness of appeal

The judgment and conviction order appealed from was filed December 15, 1988. Notice of Appeal was timely filed on December 16, 1988.

Bail Status

Mr. Austin is at liberty on conditions of probation set at the time of sentencing. Those conditions of probation requiring four months imprisonment in a jail-type institution and 400 hours of community service were stayed by the District Court during the course of Mr. Austin's appeal (ER 81-82).¹

1

Abbreviation Code:

"CR" = Clerk's Record
"ER" = Excerpt of Record
"RT" = Reporter's Transcript

NATURE OF THE CASE

This is an appeal from a stipulated facts trial in the United States District Court for the District of Oregon before the Honorable Malcolm F. Marsh.² Mr. Austin was found guilty of a single violation of 16 U.S.C. 470ee (a) & (d), the Archaeological Resource Protection Act.³ Mr. Austin preserved his right to appeal the denial of his motions to dismiss for prosecutorial vindictiveness as well as challenge the constitutionality of the statute itself.

COURSE OF PROCEEDINGS AND DISPOSITION

On February 10, 1988, a fourteen count Indictment was returned charging Mr. Austin with violations of 16 U.S.C. §470ee(a) & (d); 18 U.S.C. §641; and 21 U.S.C. 844 (CR 1). On February 16, 1988, appellant was arraigned on this original Indictment and entered pleas of not guilty (CR 2). Pretrial motions were filed on appellant's behalf, including a motion to dismiss the various counts alleging violation of ARPA as unconstitutionally vague on its face and as applied (CR 16).

On March 10, 1988, a Superceding Indictment was filed. This new indictment alleged numerous violations of 18 U.S.C. §1361, depredation against property of the United States, in addition to

² Judgment was entered by the Honorable James M. Burns.

³ Archaeological Resource Protection Act will hereinafter be referred to as ARPA.

the violations contained within the original Indictment (CR 18). On March 18, 1988, Mr. Austin entered pleas of not guilty to the Superceding Indictment (CR 22).

On March 23, 1988, appellant filed a motion requesting dismissal of the Superceding Indictment based on prosecutorial vindictiveness. The primary basis of this motion was that the Superceding Indictment contained no new factual allegations and was obtained after Mr. Austin had exercised constitutional and procedural rights (CR 23). The District Court entered an order allowing the appellant's motion to adopt his previously submitted motions, including his claim that ARPA was unconstitutional (CR 24). On April 7, 1988, the government filed a response to the appellant's pretrial motions (CR 25).

Pretrial motions hearings were held on April 11, 1988, before Judge Marsh (CR 26). Both the motion to dismiss the Superceding Indictment based on prosecutorial vindictiveness and the motion to dismiss the ARPA counts based on the constitutional challenge to the statute were taken under advisement. On April 29, 1988, Judge Marsh rendered a written opinion denying both motions (CR 30).

On June 9, 1988, a second Superceding Indictment was filed (CR 37). Mr. Austin entered pleas of not guilty to this second Superceding Indictment on June 20, 1988 (CR 41). The District Court granted the appellant's motion to adopt his previously submitted motions to the second Superceding Indictment (CR 42). The opinion of April 29, 1988, was adopted for the purpose of the second Superceding Indictment (CR 44).

During July and August of 1988, Mr. Austin and the government engaged in negotiations about the resolution of his case. As a result, a bench trial was held on September 13, 1988, with the parties entering into stipulation of facts regarding count 13 of the Indictment alleging a single violation of ARPA (ER 50 - 58). On September 13, 1988, the Court entered an order finding Mr. Austin guilty of count 13 of the second Superceding Indictment (CR 48).

On November 14, 1988, Mr. Austin was sentenced by Judge Burns to two years imprisonment, suspended, and placed on probation for a period of five years under conditions of confinement in a jail-type institution for a period of four months and performance of 400 hours of community service (CR 52). The period of incarceration and community service portion of probation were stayed during appeal (CR 52). The remaining counts of the second Superceding Indictment were dismissed upon the government's motion (CR 52).

The judgment order was entered on December 15, 1988. Notice of appeal was timely filed on December 16, 1988 (CR 55).

STATEMENT OF FACTS

In 1986, the Forest Service began an investigation of a possible violation of ARPA based on their contact with a confidential informant named "Red". The informant had stated that Mr. Brad Austin had been taking Indian artifacts (primarily arrowheads) from national forest land.

In March, 1987, several Forest Service agents participated in the surveillance of Mr. Austin's house trailer. During this period of surveillance, a screen of the type known to be used to excavate artifacts was observed. In addition, Mr. Austin was heard to be working in the trailer and, periodically, exiting the trailer to empty the contents of a pan onto the ground. Several artifacts, including one recognized as a rock hammer and several projectile points, along with a "digging" tool were observed laying by Mr. Austin's trailer.

In July, 1987, a vehicle registered to Mr. Austin was found apparently abandoned in the Sun River area of the Deschutes National Forest. An inventory search of the abandoned vehicle was conducted which produced several whole and broken artifacts as well as stone tools contained within the trunk compartment. Some of the collected artifacts were marked with a letter/number identification.

In August, 1987, surveillance of Mr. Austin's trailer, now located at a new area in the Deschutes National Forest, was

continued. During this surveillance, pounding noises could be heard coming from within the trailer. Again, Mr. Austin was observed to occasionally come out of the trailer with a pan and dump it on the ground. Obsidian chips as well as a metal screening device were observed near the trailer.

Based on this information, a federal search warrant for Mr. Austin's trailer was obtained on September 3, 1987. The search of the trailer led to the seizure of numerous artifacts, including several projectile points linked to a site in the Deschutes National Forest labeled "Luna Lava Butte". In addition to the artifacts, various tools used in the excavation and processing of artifacts, a handwritten field log book, and Deschutes National Forest maps with handwritten markings were seized.

Several of these seized artifacts were linked to the "Luna Lava Butte" site by comparison of the labeled artifacts with sections of the field log book and soil resource maps. Exemplars of Mr. Austin's handwriting were obtained by a Forest Service agent. It was the opinion of this agent that Mr. Austin was the author of the written and printed entries in the printed log book and resource maps seized from his trailer linking the artifacts to the Luna Lava Butte site.

Government archaeologists examined the Luna Lava Butte site and were of the opinion that very recent subsurface excavation in the nature of an archaeological dig had occurred. In addition, the archaeologists were of the opinion that the great majority of resources linked to this site were retrieved from below the surface

of the ground. Finally, the government archaeologists concluded that it would have cost \$26,667.00 to have properly retrieved the scientific information which would have been obtainable prior to the excavation of the Luna Lava Butte site.

No permit for excavation and removal of archaeological resources for the Luna Lava Butte site was ever issued to Mr. Austin. This site was within the Deschutes National Forest and considered "public land" owned and administered by the United States as part of the national forest system.

These facts were presented and stipulated to by the parties in a stipulated facts trial on September 13, 1988 (ER 50 - 61). The Court found Mr. Austin guilty of one count of a violation of ARPA based on the stipulation. Mr. Austin preserved his right to appeal the Court's prior rulings on the underlying constitutionality of the statute itself as well as his contention that the Indictment should have been dismissed for prosecutorial vindictiveness.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT RULED THAT THE ARCHAEOLOGICAL RESOURCE PROTECTION ACT IS CONSTITUTIONAL AND NOT VOID FOR VAGUENESS.

A. Standard of Review.

This issue is purely a legal question. The defense stipulated to the government's case and waived a jury in part in an effort to set up a purely legal question concerning the constitutionality of the Archaeological Resource Protection Act (ARPA). 16 U.S.C. §470ee (a) & (d). The Court is to review the issue de novo. United States v. McConney, 728 F.2d 1195, 1201 (9th Cir. 1984), cert. denied, __ U.S. __, (1984).

The appellant sought dismissal of the counts alleging violation of ARPA based on the underlying constitutionality of the statute itself in a Motion to Dismiss submitted to the Court (ER 6). The Court ruled against this Motion and rendered a written opinion (ER 22-31).

B. Introduction

The Archaeological Resource Protection Act, 16 U.S.C. §470aa, et seq., was passed in 1979 in an effort to cure the unconstitutionality of the old Antiquities Act which was declared fatally vague in violation of the due process clause of the United States Constitution in United States v. Diaz, 499 F.2d 113 (9th

Cir. 1974). The relevant provisions of 16 U.S.C. §477ee are set forth below:

(a) No person may excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands or Indian lands unless such activity is pursuant to a permit issued under section 470cc of this title, a permit referred to in section 470cc(h)(2) of this title, or the exemption contained in section 470cc(g)(1) of this title.

(d) Any person who knowingly violates, or counsels, procures, solicits, or employs any other person to violate, any prohibition contained in subsections (a), (b), or (c) of this section shall, upon conviction, be fined not more than \$10,000.00 or imprisoned not more than one year, or both: Provided, however, that if the commercial or archaeological value of the archaeological resources involved and the cost of restoration and repair of such resources exceeds the sum of \$5,000, such person shall be fined not more than \$20,000 or imprisoned not more than two years, or both. In the case of a second or subsequent such violation upon conviction, such person shall be fined not more than \$100,000, or imprisoned not more than five years, or both.

The definition of "archaeological resource" is contained in 16 U.S.C. 470bb(1), which reads:

As used in this chapter --

(a) the term "archaeological resource" means any material remains of past human life or activities which are of archaeological interest, as determined under uniform regulations promulgated pursuant to this chapter. Such regulations containing such determination shall include, but not be limited to: pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items. Nonfossilized and fossilized paleontological specimens, or any portion or piece thereof, shall not be considered archaeological resources, under the regulations under this paragraph, unless found in an archaeological

context. No item shall be treated as an archaeological resource under regulations under this paragraph unless such item is at least 100 years of age.

The act further provides in §kk, that:

(b) Nothing in this chapter applies to, or requires a permit for, the collection for private purposes of any rock, coin, bullet, or mineral, which is not an archaeological resource, as determined under section 470bb(1) of this title.

Appellant submits that this statutory scheme is unenforceable and void. Specifically, the definition of "archaeological resource" found in §470ee(a) is vague because it is extremely broad and inclusive of any "material remains of past human life or activities which are of archaeological interest." In addition, the enforcement provisions of ARPA contain ambiguity.

C. The Vagueness Standard

A basic principle of due process under the Fifth Amendment to the United States Constitution is that a statute is void for vagueness if its prohibitions are not clearly defined. Grayned v. City of Rockford, 408 U.S. 104, 197; 92 S.Ct. 2294 (1972). In discussing the due process requirement of legislative specificity, the Supreme Court in Connally v. General Construction Co., 269 U.S. 385, 391; 46 S.Ct. 126, 127 (1926) stated:

That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or

requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

Connally v. General Construction Co., Id., 269 U.S. at 391.

In order to survive a vagueness challenge, ARPA must "define the criminal offense with sufficient definiteness (so) that ordinary people can understand what conduct is prohibited in a manner that does not encourage arbitrary and discriminatory enforcement." United States v. Mussry, 726 F.2d 1448, 1454 (9th Cir.), cert. denied, 469 U.S. 855; 105 S.Ct. 180 (1984), citing Kolender v. Lawson, 461 U.S. 352, 357; 103 S.Ct. 1855, 1858 (1983); Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489; 102 S.Ct. 1186 (1982); Smith v. Goguen, 415 U.S. 566; 94 S.Ct. 1245 (1974).

Where First Amendment or other "fundamental" interests are involved, a stricter test of vagueness is warranted. Kolender v. Lawson, supra. The Supreme Court has held that in such circumstances "more precision in drafting may be required because of the vagueness doctrine in the case of regulation of expression." Parker v. Levy, 417 U.S. 733, 756; 94 S.Ct. 2547, 2561 (1974). A "greater degree of specificity" is demanded than in other contexts. Smith v. Goguen, supra, 415 U.S. at 573.

Vagueness challenges to statutes which do not involve First Amendment freedoms are examined in light of the facts of the case at hand. United States v. Mazurie, 419 U.S. 544, 550; 95 S.Ct. 710, 714 (1975). The statute still may be invalidated on its face "even where it could conceivably have ... some valid application."

Kolendar v. Lawson, *supra*, 461 U.S. at 358-59, n. 8. The question persists as to whether the statute provided the defendant fair and sufficient notice that the conduct he allegedly engaged in was prohibited. United States v. Mussry, *supra*, 726 F.2d at 1454.

Appellant submits that ARPA does attempt to regulate First Amendment freedoms requiring a more demanding vagueness analysis of the statute itself. ARPA concerns the regulation of expression and academic freedom in the gathering of knowledge from our past through archaeological excavations. An individual's pursuit of knowledge is of transcendent value to all of us and not merely of special concern for teachers. Keyishian v. Board of Regents of University of New York, 385 U.S. 589; 87 S.Ct. 675 (1967). Such academic freedom has long been held to be of a special concern of the First Amendment. Regents of the University of California v. Bakke, 488 U.S. 265; 98 S.Ct. 2733 (1978).

Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.

Regents of the University of California v. Bakke, Id., 98 S.Ct. at 2759.

Seeking information of our common heritage by digging for artifacts is an expression of one of the most fundamental traits of the human character, that is, the quest for knowledge and understanding of ourselves. Such fundamental behavior as the pursuit of knowledge is a cherished freedom protected by the First Amendment. Any statutory scheme attempting to regulate such expression must be closely scrutinized in order to determine whether or not it is unconstitutionally vague on its face.

In addition, ARPA does not survive the vagueness challenge in light of the facts of the case at hand. Mr. Austin was not given fair notice that the conduct he specifically engaged in was prohibited under the terms employed within the statute. Mr. Austin could not have known that the projectile points and scrapers he discovered were "archaeological resources" of "archaeological interest" without some showing of a sophisticated understanding of what those uncommon terms mean.⁴

D. The Definition of Archaeological Resource

In declaring the predecessor old Antiquities Act unconstitutionally vague, the Ninth Circuit found use of the anthropological term "object of antiquity" fatally vague in violation of the due process clause of the United States Constitution. United States v. Diaz, supra.

Here there was no notice whatsoever given by the statute that the word "antiquity" can have reference not only to the age of an object but also to the use for which the object was made and to which it was put, subjects not likely to be of common knowledge.

United States v. Diaz, Id. at p. 115.

In an attempt to clarify the impermissibly vague language contained in its predecessor act, ARPA substitutes the term "archaeological resource" in place of "antiquity". The term

⁴ The stipulation of facts can best be summarized as linking several obsidian projectile points and scrapers found in Mr. Austin's trailer to the Luna Lava Butte site. Mr. Austin did not contest removing these items from National Forest land. There are no stipulations regarding Mr. Austin's personal background or knowledge of archaeological subjects (ER 50-58).

"archaeological resource" is defined as meaning "any material remains of past human life or activities which are of archaeological interest." 16 U.S.C. 470 bb(1). The statute then attempts to further define the term "archaeological resource" by allowing for the promulgation of uniform regulations to include specific items. Among these items would be "weapons, weapon projectiles, and tools". 16 U.S.C. 470 bb(1).

Appellant contends that there can be no laundry list approach to place him on notice as to what constitutes an "archaeological resource". How can one know with some degree of certainty what constitutes "material remains of past human activities which are of archaeological interest"? Weeds and organic matter would fall within this concept although the statute has no reference to plants or other vegetable matter. Animal remains are specifically excluded, unless found in an "archaeological context". There is no hint as to what Congress had in mind by the term "archaeological context".

The term "activity" is extremely broad and encompasses more than merely tribal dwellings or burial grounds. Material remains of activity can be interpreted by various archaeologists to mean almost anything that does not grow of its own, but gives no notice to the individual what is regulated or proscribed.

Aggravating the vagueness problem is the qualifier that these material remains must be of "archaeological interest". The trial judge in the case at bar perceived this problem in posing the following question to the prosecutor:

The Court: When you use a term like archaeological along with Mr. Bates' statement, I assume that while it was of archaeological interest 25 or 55 years ago doesn't necessarily mean it is of archaeological interest today, and vice versa. Doesn't that open the statute up to some kind of subjective arbitrary determination of what that means whenever it is used? (RT 39).

Does the "archaeological interest" mean interest to the archaeological community at large, or to the individual archaeologist? How much interest must there be? Is the interest to be judged objectively or subjectively? Isn't the archaeological interest in an object entirely subjective depending upon who one questions and at what time? How could the appellant know in advance as to whether or not the objects he was found in possession of would be of "archaeological interest"?

The list provided in the statute including such items as "weapons, weapon projectiles, and tools" are examples of what could be archaeological resources. Such a list does not resolve any of the vagueness since vagueness is inherent in the items themselves. Florida Businessmen for Free Enterprise v. State of Florida, 499 F.Supp. 346 (N.D. Fla. 1980); Record Revolution No. 6, Inc. v. City of Parma, 638 F.2d 916, 930 (6th Cir. 1980) (list of common forms of drug paraphernalia did not create any presumption that any item listed was drug paraphernalia).

How might an individual know that a particular rock found was, or may have been used as a weapon? Courts continue to struggle with the interpretation of various weapons statutes today, finding that whether an item is a weapon depends upon the use to which it has been put. See, Fall v. Esso Standard Oil, 297 F.2d 411, 414

(5th Cir. 1961). Is the individual on notice that all rocks are weapons from the stone age?

What would constitute a tool? In a primitive culture, the range of "tools" could be only limited by the imagination of the user. See, e.g. State v. Reed, 36 Or App 417; 585 P.2d 711 (1978). To make criminal liability depend on the past use or intentions of person other than the charged defendant, and only in the speculative opinion of an archaeologist, violates the fundamental principles of due process. Statutes which center on use, or intended use, continue to have vagueness problems for the very reason that they require people to guess at their meaning and are openly susceptible to arbitrariness. See, Weissman v. United States, 373 F.2d 799 (9th Cir. 1967) (attempted application of statute to one who "uses narcotic drugs" held unconstitutionally vague).

Underlying the vagueness problem with this statute is the fact that criminality can only be determined after the fact. It depends entirely on what one discovers to be buried beneath the ground. The trial judge in the case at bar correctly perceived the problem in the following exchange with the prosecutor:

The Court: What do we do with the situation where the defendant or any person starts digging and looking for artifacts? We're not trying to define, we're trying to dig it. We're trying to disrupt an archaeological site. And that person comes across a remnant of rock. It is a rock and it looks peculiar, doesn't have any idea what it was for, throws it in a gunny sack, and looks at it again, and it turns out that it is some kind of grinding.

Now how does the statute allow something of natural origin that may not have been modified, just naturally came in that state, but was used as a

tool, how can a defendant knowingly fix something like that? Now, maybe this is a totally esoteric question, because of all the things that we're talking about here have been hammered out, chipped away, obviously have a form which demonstrates their utility in some way. But from the standpoint of the vagueness of the statute, what do you do with my example of a stone that happens to fit the need?

Mr. Kent: I would like to think first of all, you don't prosecute it (RT 41).

Reliance upon the government not to prosecute cases such as those described by the trial judge is not an adequate answer to the vagueness problems with the statute itself. Such a response only emphasizes the arbitrariness with which individuals can be singled out for prosecution. See, Kolender v. Lawson, supra, 103 S.Ct. at 1859, 1860. In the case at bar, it is apparent that the prosecutor was having difficulty in interpreting the meaning and consequences of ARPA and how to prosecute Mr. Austin.⁵

E. Enforcement Provision

The enforcement provisions of 16 U.S.C. §470ee (a) and (d) also contain ambiguities. It is permissible to dig for rocks, etc. under §kk, and for palentological specimens under §bb of ARPA. However, this same activity could be condemned as excavating, removing, damaging, or otherwise altering or defacing an archaeological resource as prohibited by the enforcement provision. The existence of such contrary language within the same statute creates an additional vagueness problem because it informs the public that the same conduct can be legal and illegal, depending

⁵See subsequent section on prosecutorial vindictiveness.

upon what turns up. How can one know in advance if an archaeological resource will be altered or defaced if its definition (and very proscription) depends upon the context of its placement, particularly when this cannot easily be known without further exploration of the area?

Another serious ambiguity within the enforcement provisions surrounds the division between felonious and misdemeanor conduct. The statute makes an effort to distinguish this conduct based upon the value of the archaeological resource and the cost of restoration and repair. Again, the problem of defining "archaeological value" presents many of the problems discussed in the previous section concerning the definition of "archaeological resource". Is "archaeological value" the loss of knowledge or is it physical damage to the resource? Is an estimate of value to be based upon the scope of the hole allegedly dug, or the entire rock shelter itself? Does one consider the market for historical artifacts or the professional value of items as determined by museums and universities? These and many other questions persist by use of undefined terms of uncommon usage such as "archaeological value".

II. THE TRIAL COURT ERRED IN NOT DISMISSING THE SECOND SUPERCEDING INDICTMENT FOR VINDICTIVE PROSECUTION.

A. Standard of Review

This issue is subject to a de novo standard of review. The historical facts, upon which it is based, are undisputed. United States v. McConney, supra.

B. Introduction

On February 10, 1988, a fourteen-count Indictment was returned, charging Mr. Austin with violations of 16 U.S.C. §470ee (a) and (d); 18 U.S.C. §641; and 21 U.S.C. §844 (CR 1). Subsequent to this Indictment, appellant filed various pretrial motions including a motion to dismiss the various counts alleging violation of ARPA as unconstitutional as enacted and void for vagueness (CR 16).

Subsequent to exercising these procedural rights, a Superceding Indictment was filed on March 10, 1988, alleging numerous violations of 18 U.S.C. §1361, depredation against property of the United States, in addition to the previously alleged violations contained within the original Indictment (CR 18). Both the original Indictment and the Superceding Indictment were based on the identical facts and circumstances known to the prosecutor at the time of the filing of the first Indictment. In the original Indictment, Mr. Austin was facing a potential maximum penalty of 64 years incarceration. The Superceding Indictment increased Mr. Austin's potential liability to 174 years, a net

increase of 113 years.⁶

Once an accused has exercised some procedural right, whether a constitutional right, a common law right, or a statutory right, the prosecution bears a heavy burden of proving that any increase in the severity of charges was not motivated by vindictiveness. In addition, the reason for an increase in the gravity of the charges must be made to appear not withstanding the prosecutor's discretion in initially choosing which charges to bring. United States v. Ruesga-Martinez, 534 F.2d 1367 (9th Cir. 1976).

The appellant must make only a prima facie showing that the prosecutor has re-indicted him and increased the severity of charges after he has exercised some procedural right. United States v. Bendis, 681 F.2d 561 (9th Cir. 1981), cert. denied, 459 U.S. 973 (1982); United States v. DeMarco, 550 F.2d 1224 (9th Cir.), cert denied, 434 U.S. 827 (1977).

In the case at bar, the appellant exercised his procedural rights by the filing of numerous motions in this matter after the original Indictment, including motions for dismissal of various counts for both constitutional and statutory reasons. The prosecutor sought subsequent Indictments increasing the severity of the charges after the filing of these motions. The appellant is not required to demonstrate that the prosecution in fact acted with "malicious or retaliatory motive... instead once the defendant has

⁶ A second Superceding Indictment was filed subsequent to Judge Marsh's opinion denying the appellant's motion to dismiss based on prosecutorial vindictiveness of the first Superceding Indictment. The Court allowed the adoption of the defendant's motion as well as the opinion to be applied to this second Superceding Indictment for the purpose of appeal (ER 45 -47).

made this prima facie showing, vindictiveness may be inferred." United States v. Burt, 619 F.2d 831, 836 (9th Cir. 1980). United States v. Gann, 732 F.2d 714 (9th Cir. 1984). The appellant demonstrated "an appearance of vindictiveness" on the part of the prosecutor. United States v. Shaw, 655 F.2d 168, 171 (9th Cir. 1981). "It is the appearance of vindictiveness rather than vindictiveness in fact, which controls." Id. at 171.

Once the appellant demonstrated an "appearance of vindictiveness", the burden then shifted to the prosecutor to show that any increase in the severity of the charges was not motivated by vindictiveness, but rather, by independent reasons or intervening circumstances. United States v. Shaw, 655 F.2d at 171; United States v. Bendis, 681 F.2d at 569; United States v. Burt, 619 F.2d at 836.

C. The Prosecutor's Motive

The motive ascribed to the prosecutor for the filing of the subsequent Indictment is undisputed in this case. The prosecutor explained to the Court his motive as follows:

Mr. Kent: In my explanation as to why we have a Superceding Indictment here is very simple. In the course of my research in responding to the motion to elect, I came across this case of United States v. Jones, cited in a couple of locations, but also cited on page 10, a Ninth Circuit, 1979 case which stood for the proposition that the old -- even though the old Antiquities Act, which was -- I really shouldn't call it the predecessor act because it still exists, but a companion Archaeological Resource Act had been declared unconstitutionally vague.

And the Ninth Circuit concluded that even if it had been declared unconstituionally vague, the

government could nevertheless proceed under the theft and damage theory. And that is the reason that we have a Superceding Indictment....

My motive was in response to legal research that I came upon for -- or an opinion that I came upon in the course of my research in response to these motions. (RT 15, 16).

Appellant contends that the motive asserted by the prosecutor, that is his self-confessed lack of understanding of the law as it pertains to other potential charges related to violation of ARPA, and his concern over the constitutionality argument previously put forward by the appellant, is sufficient grounds in and of itself for dismissal of the Superceding Indictment. United States v. Heldt, 745 F.2d 1275 (9th Cir. 1984); United States v. Ruesga-Martinez, supra.

In United States v. Ruesga-Martinez, 534 F.2d at 1369 (9th Cir. 1976), the Ninth Circuit held that the inexperience of a prosecutor was not a valid excuse for failure to bring more serious charges in the first Indictment absent a showing of intervening circumstances such as new facts coming to light. In the case at bar, it is uncontested that there were no new facts between the time of the original Indictment and the Superceding Indictment. The additional counts concerning damage to United States property were based on the identical sites where the appellant was accused of excavating artifacts. The only intervening circumstances between the original Indictment and the Superceding Indictment was the prosecutor's discovery of case law allowing him to bring additional charges against the appellant based upon his research in response to appellant's motions. Once appellant raised the

constitutionality issue, the prosecutor's fear that the appellant could prevail in this argument motivated him to 'up the ante' with additional charges not subject to a constitutional attack. This situation is analogous to the situation in the Ruesga-Martinez case in which an inexperienced prosecutor originally indicted the defendant for a misdemeanor unlawful entry charge and, after exercise of a procedural right, re-indicted the defendant in a felony Indictment.

In United States v. Heldt, the Court stated that "a claim of vindictive prosecution might be successful in a case where it was proved that an increase in charges was in response to a motion to suppress." Id. at p. 1281. The increase in charges in Mr. Austin's case was made in response to a motion to dismiss. The same principle should be applied.

The trial court in its opinion denying appellant's motion for dismissal based on prosecutorial vindictiveness cites the case of United States v. Goodwin, 457 U.S. 368, 378; 102 S.Ct. 2485, 2492 (1982). In Goodwin, the Court stated, "In the course of preparing a case for trial the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the United States has broader significance." Id. at p. 2492. However, the Supreme Court in Goodwin did not distinguish between newly acquired factual information versus legal knowledge. The motive of the prosecutor in the Goodwin case for seeking increased severity in the charges were of a factual nature. By affidavit, the Assistant United

States Attorney in the Goodwin case set forth the following reasons for his action:

- (1) He considered the seriousness of the defendant's conduct on the date in question;
- (2) the defendant had a lengthy history of violent crime;
- (3) he considered the defendant's conduct to be related to major narcotics transactions;
- (4) he believed that the defendant had committed perjury at his preliminary hearing; and
- (5) the defendant had failed to appear for trial as originally scheduled.

United States v. Goodwin, supra, fn. 2 at p. 2488.

The prosecutor's self-proclaimed motives in the case at bar were clearly not related to any factual circumstances involving Mr. Austin's behavior. His sole motive for increasing the severity of the charges was made in response to the defendant's motions and his desire not to jeopardize losing his case based on the constitutional attack. Prosecutorial vindictiveness exists under these circumstances. United States v. Ruesga-Martinez, supra; United States v. Heldt, supra.

CONCLUSION

For all of the reasons set forth herein, appellant's conviction should be reversed.

RESPECTFULLY SUBMITTED this 15th day of March, 1989.


Andrew Bates
Attorney for appellant

CERTIFICATE OF RELATED CASES

No related cases are known to counsel.

CERTIFICATE OF SERVICE

I hereby certify that I have made service of the foregoing
OPENING BRIEF OF APPELLANT
by hand delivering on March 15, 1989, a certified true and
full copy thereof, to:

Jeffrey Kent
Assistant U.S. Attorney
211 East 7th St.
Eugene, OR 97401



Joyce Naffziger

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I

QUESTIONS PRESENTED

A. Whether the Archaeological Resources Protection Act (ARPA) Adequately Informed Austin That His Conduct was a Crime.

B. Whether the Prosecution Properly Sought New Charges in Superseding Indictments in This Case.

II

JURISDICTION

The district court had original jurisdiction to adjudicate these matters involving "offenses against the laws of the United States" pursuant to 18 U.S.C. § 3231.

This court has jurisdiction of these "final decisions of the district court of the United States" pursuant to 28 U.S.C. § 1211.

III

STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from an October 4, 1988 formal order finding defendant Bradley Owen Austin guilty, entered by District Court Judge Malcolm Marsh after a September 13, 1988 stipulated facts bench trial on

Count 13 of the Second Superseding Indictment, charging Austin with the knowing excavation and removal of archaeological resources with an archaeological value in excess of \$5,000 from the Luna Lava Butte area of the Deschutes National Forest (hereinafter DNF) in Oregon without a permit, in violation of the Archaeological Resource Protection Act (hereinafter ARPA), 16 U.S.C. § 470ee(a) and (d). (E.R. 34-44, 50-80).¹

Austin appeals the denial of his two pre-trial claims that the indictment should have been dismissed because ARPA was unconstitutionally vague and that the filing of additional charges against Austin in superseding indictments were the product of prosecutorial vindictiveness.

After being found guilty, Austin was sentenced by District Court Judge James Burns on November 14, 1988 (E.R. 81-82). The district court imposed a suspended two year period of imprisonment on the condition that Austin be confined to a jail-type setting for a period of four months and also sentenced him to five years probation on the additional special condition that he perform 400 hours of community service as directed by the probation office (E.R. 81-82). The district court ordered that the probationary phase of the sentence commence immediately but that the community service condition of probation be stayed pending appeal. The court also stayed the four month jail sentence pending the conclusion of

¹ As used hereafter, "E.R." denotes the Excerpt of Record; "C.R." the Clerk's Record; "G.E.R." the Government's Excerpt of Record; "D.Br." defendant's brief on appeal; and "R.T." the reporter's transcript.

this appeal (E.R. 81-82).

The judgment and commitment order was formally signed on December 13, 1988 (E.R. 81-82).

The notice of appeal was filed on December 16, 1988 (E.R. 83).

B. Proceedings and Disposition in the District Court

On February 10, 1988, a fourteen count indictment was returned against Austin, charging him with ARPA violations pursuant to 16 U.S.C. § 470ee at eight different archaeological sites within the DNF, the Ochoco National Forest, and Bureau of Land Management (BLM) land in Oregon in the years 1985, 1986 and 1987. In addition, Austin was charged with five felony counts of theft of government property (the archaeological resources) having a value in excess of \$100 at five of these sites, in violation of 18 U.S.C. § 641. Count 14 also charged Austin with misdemeanor possession of methamphetamine in violation of 21 U.S.C. § 844. (E.R. 1-5).

On February 26, 1988, Austin filed a motion to dismiss the ARPA counts on grounds of unconstitutional vagueness (C.R. 16). Austin also filed a motion to elect between counts, claiming that the government could not proceed on both an ARPA theory and a general theft theory and that the specific ARPA provisions pre-empted the general theft statute (C.R. 15).

On March 10, 1988, the government obtained a superseding indictment against Austin, charging him in a twenty-five count indictment involving these same eight archaeological sites charged under three different theories -- an ARPA count, a Section 641 theft of government

property count, and a new third theory of prosecution, depredation of government property having a value in excess of \$100, through the removal of these artifacts and damage to the site, pursuant to 18 U.S.C. § 1361. In addition, Austin remained charged with misdemeanor possession of methamphetamine. (E.R. 7-15).

On March 28, 1988, Austin filed a motion seeking dismissal of the superseding indictment on the ground that these charges were added vindictively after Austin had moved to dismiss the original indictment because of ARPA's vagueness, among other grounds. (E.R. 18-21).

On April 7, 1988, the government filed its response to Austin's pre-trial motions, contending that ARPA was not unconstitutionally vague. The government's response further stated that additional charges were not brought because the defendant moved to dismiss the original indictment but rather because an opinion, discovered during its legal research, held that both Section 641 and Section 1361 are valid theories of prosecution in an archaeological theft and damage case. United States v. Jones, 607 F.2d 269 (9th Cir. 1979). (G.E.R. 7-11)²

On April 11, 1988, Judge Marsh conducted a hearing on the pre-trial motions (R.T. 1-46) and on April 29, 1988 in a written opinion denied Austin's motion to dismiss the ARPA counts because of vagueness,

² The defense failed to bring relevant authority, including the Jones case, to the attention of the court in both its motion to dismiss and its motion to elect between counts (C.R. 15, 16, 23). The defense here has failed to include in its excerpt of record the government's response to its pre-trial motions, explaining the reasons why it sought a superseding indictment, so we have added it to the Government's Excerpt of Record (G.E.R. 1-12).

denied his motion to elect between the Sections 641 and 1361 counts and the ARPA counts and denied his motion to dismiss the superseding indictment on grounds of prosecutorial vindictiveness (E.R. 22-32).

On June 9, 1988 the government procured a second thirty-count superseding indictment against Austin, adding two newly verified archaeological sites as locations where Austin excavated under ARPA, stole under Section 641, and damaged under Section 1361 (E.R.34-44).³

On September 13, 1988, Judge Marsh found Austin guilty of the ARPA violation in Count 13 of the Second Superseding Indictment pursuant to a stipulated facts trial and formally entered an order of his guilty finding on October 4, 1988 (E.R. 34-44, 50-80).

As noted, on November 14, 1988, Judge James Burns sentenced Austin to two years incarceration, which the court suspended, with the condition that Austin serve four months in a jail-type setting, and placed Austin on five years probation with the special condition that Austin perform 400 hours of community service under the supervision of the probation office (E.R. 81-82). The other counts in the second superseding indictment were then dismissed pursuant to the government's motion and its agreement with the defense (C.R. 52).

The formal judgment order to this effect was signed by Judge Burns on December 13, 1988 (E.R. 81-82) and a notice of appeal was filed on December 16, 1988 (E.R. 83).

³ The misdemeanor drug count was dropped after Judge Marsh dismissed those charges in the prior indictment because all of the drugs had been consumed during testing (E.R. 30-31).

STATEMENT OF FACTS1. Background

Pirates having no respect for the preservation of our posterity are plundering our past.

The best estimate is that man occupied North America a mere 12,000 years ago, passing over the Bering Sea straits out of Asia. (G.E.R. 24-33). The sites man occupied hold great secrets into how he lived in the early years of his occupation of this continent. Id.⁴

Ten of these sites, many specifically identified by archaeologists on public lands as potentially rich in meaning, were plundered by defendant Bradley Austin (E.R. 34-44, G.E.R. 15-16, 34-35). Many of the 2,800 artifacts seized from Austin were at least 7,000 years old, and most were between 2,000 and 7,000 years old (E.R. 56).

When Congress passed ARPA in 1979, it found that:

(1) archaeological resources on public lands and Indian lands are an accessible and irreplaceable part of the Nation's heritage;

(2) these resources are increasingly endangered because of their commercial attractiveness;

(3) existing Federal laws do not provide adequate protection to prevent the loss and destruction of these archaeological resources and sites resulting from uncontrolled excavations and pillage; and

⁴ The government attached to its sentencing letter relevant excerpts of an October, 1988 National Geographic magazine, entitled The People of the Earth.

(4) there is a wealth of archaeological information which has been legally obtained by private individuals for noncommercial purposes and which could voluntarily be made available to professional archaeologists and institutions.

(b) The purpose of this chapter is to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands, and to foster increased cooperation and exchange of information between governmental authorities, the professional archaeological community, and private individuals having collections of archaeological resources and data which were obtained before October 31, 1979.

16 U.S.C. § 470aa.

Government archaeologists Jill Osborn and Carl Davis spoke of the irreparable losses and damage caused by Austin's activity:

Exactly how old these sites are, who was there and why, can only be ascertained through careful study of the artifacts within their context. Mr. Austin's actions have precluded that study by carelessly ripping the artifacts from the ground. . . .

[M]any Indians and non-Indians alike have little understanding of the achievements and contributions of Indian People to the broad process of human cultural evolution in this region and throughout North America.

The artifacts contained in these sites are clues to the mysteries of the past. They require careful exposure and study within their original context at the site, then careful documentation and removal to have any value as scientific evidence. . . .

Through this pain-staking [sic] study of sites and archaeological context, archaeologists are slowing [sic] piecing together the broad evolutionary outline of American Indian prehistory in central Oregon and across North America. The emerging picture is both complex and exciting. But time is running out. Mother Nature and modern development take a daily toll on a rapidly diminishing archaeological resource base.

This situation is greatly compounded by the illegal artifact digging and theft which is such a great problem throughout the American West and of which Mr. Austin is a part. The goal of illegal artifact collecting and digging is not to acquire information about American Indians; the goal is to acquire artifacts for personal collections or for monetary gain. With little regard for history or scientific knowledge, collectors loot thousands of archaeological sites each year in this region looking for aesthetically pleasing Indian artifacts. Not only does this activity result in great scientific loss, it is also deeply repulsive and a terrible sacrilege to contemporary American Indian peoples whose ancestors' graves have been torn apart and bones scattered to the winds by artifact looters searching for spectacular artifacts.⁵

* * *

The resource loss caused by Mr. Austin's illegal digging at Luna Lava and other archaeological sites in this region cannot be replaced, despite the return of the damaged tools and artifacts in small cardboard boxes and coffee cans. The information loss is total and complete.

(G.E.R. 34-35).

2. Statement of Facts

After extensive surveillance of defendant Bradley Austin's activity in the DNF over a number of months and an earlier search of his

⁵ Austin claimed in his sentencing letter that his activities were motivated to preserve the Native American culture (G.E.R. 40-41). As the archaeologists noted, Native Americans consider Austin's conduct repulsive and sacrilegious. Delbert Frank of the Confederated Tribes of the Warm Springs Reservation wrote to the court that "the pillaging of the campsites of our ancestors and the theft of the tools left by them is a direct affront to our culture. The action of Mr. Austin are abhorred by all Native Americans." (G.E.R. 42). Charles Kimbol of the Klamath Tribe described Austin's activity as "mutilating areas of cultural importance" and "a heinous crime" (G.E.R. 43). Douglas Hutchinson of the State Commission on Indian Services stated that Austin's conduct "has caused great harm, not only to the scientific community and scholars, but to the living decedents (sic) of those whose graves were destroyed." (G.E.R. 45-46).

apparently abandoned vehicle containing numerous artifacts, law enforcement agents executed a search warrant on September 8, 1987 on a house trailer located on the DNF and occupied by Austin (E.R. 51). The search uncovered approximately 2,800 artifacts, including weapon projectiles, tools, and pottery (E.R. 51). Many of the artifacts had been labeled and stored in cabinet drawers identified by geographical location (E.R. 51). The search also uncovered a number of documents, including Austin's handwritten field log book and a DNF Soil Resource Inventory Map publication with his handwritten notes, which eventually led law enforcement and Forest Service (FS) archaeologists to ten different archaeological sites where significant recent excavation had occurred⁶ (E.R. 51-53, 55-57).

Also recovered at the trailer were a number of other items indicating Austin's involvement in and knowledge of archaeological activity. These included:

- a) implements used in the excavation and processing of artifacts (E.R. 51);
- b) a number of books relating to archaeological activity and laws governing this activity (E.R. 52);
- c) photographs showing Austin excavating ground and using archaeological implements (E.R. 52); and

⁶ Many of these sites had been confidentially identified by FS archaeologists as having significant archaeological potential (G.E.R. 15-16).

d) even a FS sign advising the public of the prohibitions and penalties of the Antiquities Act of 1906 (E.R. 52).

A cabinet drawer tagged Luna Butte and artifact display cases contained over forty weapon projectiles and tools, which were correlated by FS archaeologists by labels, entries in his handwritten field log book, and his notations on soil resource maps to an area which had been archaeologically excavated recently in the Luna Lava Butte area of the DNF (E.R. 50-52, 55-57).

In the opinion of the archaeologists, these artifacts were archaeological resources within the meaning of ARPA ranging from between 2,000 and 7,000 years old, many were tools such as knives and scrapers, and at least the great majority were excavated from below the surface of the ground (E.R. 56-57).

While inspecting an area noted by Austin's handwriting in the Luna Lava Butte vicinity of the DNF on the soil resources map, the FS archaeologists found recent substantial subsurface excavation in the nature of an archaeological dig (E.R. 57). They concluded that the "archaeological value" of this site within the meaning of ARPA, 16 U.S.C. § 470ee(d), and its regulations, 43 C.F.R. § 7.14, was at least \$26,667 in that it would have cost that much to have properly retrieved the scientific information from that site prior to Austin's excavation (E.R. 57).

FS personnel would further establish that Austin had not been granted a permit to conduct archaeological digs in this area or any area of the DNF, which are public lands within the meaning of ARPA (E.R. 58).

Similar testimony and exhibits would have supported the illegal excavation of nine other archaeological sites on the DNF, the Ochoco National Forest, and BLM land during 1985, 1986, and 1987 (E.R. 50-56; G.E.R. 15-16, 34-35).

V

ARGUMENT

A. ARPA Adequately Informed Austin that His Activities were Unlawful

1. Standard of Review

This Court reviews de novo a district court conclusion as to whether a statute is constitutional insofar as it involves a legal conclusion. FTC v. American National Cellular, Inc., 810 F.2d 1511, 1513 (9th Cir. 1987); United States v. Miller, 771 F.2d 1219, 1225 (9th Cir. 1985). This also holds true for the definition of words in a statute. United States v. Wiegand, 812 F.2d 1239, 1243-44 (9th Cir. 1987). It also holds true for the interpretation of a statute. United States v. Arrellano, 812 F.2d 1209, 1211 (9th Cir. 1987).

However, this Court reviews factual findings made pursuant to a statutory scheme under a clearly erroneous standard. United States v. Stone, 813 F.2d 1536, 1538 (9th Cir. 1987).

2. ARPA: Its Provisions and Its Background

ARPA was passed in 1979 in response to many years of concern that our archaeological past was being destroyed through wholesale pillaging for artifacts on archaeologically significant sites on public

lands.⁷

Section 470ee(a) of Title 16 states:

No person may excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands or Indian lands unless such activity is pursuant to a permit issued under section 470cc of this title . . .

Congress also passed ARPA at least in part in specific response to this Court's opinion of United States v. Diaz, 499 F.2d 113 (1974), which declared certain terms such as "antiquity" in the Antiquity Act of 1906 to be unconstitutionally vague. In fact, the legislative history takes specific note of the Diaz opinion and Congress' intent to "address the problem of unconstitutional vagueness, created by the lack of definition, found by the . . . Ninth Circuit" in that opinion. Act of October 31, 1979, Pub. L. No. 96-95, 1979 U.S. Code Cong. & Admin. News (93 Stat.) 1710-11.

Section 470bb(1) of Title 16 defines the term "archaeological resource" as:

any material remains of past human life or activities which are of archaeological interest, as determined under uniform regulations promulgated pursuant to this chapter. Such regulations containing such determination shall include but not be limited to: pottery, basketry, bottles, weapons, weapons projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items. Nonfossilized and

⁷ For an extensive discussion of the history of archaeological theft laws in our country, see K. Rogers, Visigoths Revisited: The Prosecution of Archaeological Resource Thieves, Traffickers, and Vandals, 2 J. Envtl. L. & Litig. 47-105 (1987) (hereinafter "Visigoths Revisited").

fossilized paleontological specimens, or any portion or piece thereof, shall not be considered archaeological resources, under the regulations under this paragraph, unless found in an archaeological context. No item shall be treated as an archaeological resource under regulations under this paragraph unless such item is at least 100 years of age.

Federal regulations further refine the definition of "archaeological resource." 43 C.F.R. § 7.3.

ARPA also makes clear that certain conduct is exempt from its prohibitions, such as surface collection of arrowheads, 16 U.S.C. § 470ee(g),⁸ private rock collections not otherwise an archaeological resource, 16 U.S.C. § 470kk(b), and paleontological specimens unless found in an archaeological context, 16 U.S.C. § 470bb(1).⁹

Notably, Austin's conduct is explicitly covered in the statute -- the excavation and removal of "weapon projectiles" and "tools" over one hundred years old from public lands without a permit -- and no exemption pertains to his conduct.

The statute also provides for these penalties:

Any person who knowingly violates, or counsels, procures, solicits, or employs any other person to violate, any prohibition contained in subsection (a), (b), or (c) of this section shall, upon conviction, be fined not more than \$10,000 or imprisoned not more than one year, or both: Provided, however, that if the commercial or archaeological value of the archaeological resources involved and the cost of restoration and

⁸ Surface collection of arrowheads on public lands remains a petty offense. E.g., 36 C.F.R. § 261.2.

⁹ For a discussion of the history behind these and other exemptions in ARPA, see K. Rogers, Visigoths Revisited, 2 J. Envtl. L. & Litig. at 68-74.

repair of such resources exceeds the sum of \$5,000, such person shall be fined not more than \$20,000 or imprisoned not more than two years, or both.

16 U.S.C. § 470ee(d).

Regulations passed by the Department of the Interior in 1984 pursuant to statutory authority, 16 U.S.C. § 470ii, further expanded upon the meanings of "value" within the statute and "archaeological value" in particular:

Archaeological value. . . . This value shall be appraised in terms of the costs of the retrieval of the scientific information which would have been obtainable prior to the violation. These costs may include, but need not be limited to, the cost of preparing a research design, conducting field work, carrying out laboratory analysis, and preparing reports as would be necessary to realize the information potential.

43 C.F.R. § 7.14(a).

According to the stipulated testimony of the government archaeologists, Austin's conduct destroyed over \$26,000 in archaeological value at the Luna Lava Butte site, which is what it would have cost to have properly retrieved the artifacts and scientific information located there¹⁰ (E.R. 57).

Thus, after careful efforts as to what should be covered under the statute and what should not and after equally careful efforts

¹⁰ Austin's conduct caused the loss of over \$100,000 in archaeological value at all sites (G.E.R. 15-16). Notably, these figures do not include the actual commercial market--black or otherwise--of the 2,800 artifacts were they to be sold. 43 C.F.R. § 7.14(b). Nor did it include the cost of restoration and repair of the sites. 43 C.F.R. § 7.14(c). Both of these figures would have substantially increased the economic impact of these crimes. Of course, any values detract from the truly invaluable character of artifacts such as these.

in drafting language conveying this intent, Congress and regulators passed provisions of ARPA which clearly informed Austin that his subsurface excavation and removal of millenia-old weapons, projectiles, and tools from public lands without a permit was unlawful.

3. ARPA Adequately Informed Austin
that His Conduct was Unlawful

ARPA plainly and clearly prohibits individuals from digging up and removing without a permit weapon projectiles and tools left hundreds and thousands of years ago by our ancestors on public lands. This was exactly what Austin was doing wholesale at ten archaeologically rich sites on public lands in Central and Eastern Oregon from 1985 until 1987 when thousands of artifacts as old as 7,000 years were excavated and removed. (G.E.R. 15-16, 34-35).

Austin was no amateur or hobbyist cruising the surface of public lands for souvenir arrowheads. His activity took him to methodically excavating a number of sites, specifically identified by government archaeologists as potentially significant.¹¹ (G.E.R. 15-16, 34-35). He had other archaeological publications in his trailer (E.R. 52). He had the tools of the profession, such as a sifting screen (E.R. 51). He tagged and classified many of the artifacts as an archaeologist might (E.R. 51). Ironically, he even had a FS sign warning the public about violations of the Antiquities Act of 1906¹² (E.R. 52.)

¹¹ A public land manager for preservation purposes may classify such information. 16 U.S.C. § 470hh and 36 C.F.R. § 296.18.

¹² This again was the archaeological theft act which this Court declared unconstitutionally vague in United States v. Diaz, 499 F.2d 113 (9th Cir. 1974), leading in part to Congress' passage of ARPA.

Thus, the evidence indicates not only that Austin's activity fell under ARPA's plain censure but also that Austin clearly knew that ARPA censured his activity.¹³

The defense attempts to elevate the plundering of public lands in search of artifacts to First Amendment status by claiming that ARPA unconstitutionally inhibits academic freedom (D.Br. at 12-13). Its reason for making this argument is transparent. ARPA clearly prohibited Austin's specific activities in this case -- excavating and removing buried weapon projectiles and tools from public lands without a permit. Only if the defense can conjure up hypotheticals where ARPA's prohibitions lack the same clarity governing Austin's conduct and only if the defense can persuade the court that ARPA should be analyzed as a law unlawfully infringing First Amendment activity can it hope to succeed in this appeal. In making his claim of unconstitutionality, Austin urges this court to apply a facial voidness analysis to ARPA, causing any potentially vague applications of ARPA to void the entire statute even if it is crystally applicable to most other conduct such as Austin's conduct in this case.

a) Austin's Hypotheticals Bear No Relevance to this Case Involving Specifically Identified "Tools" and "Weapon Projectiles"

Austin conjures up hypotheticals involving weeds, organic matter, and animal remains cast in certain settings and questions whether

¹³ ARPA is a general intent crime, merely requiring that Austin knowingly do the prohibited acts rather than wilfully and knowingly violate the law.

these items would be considered "archaeological resources" under ARPA (D.Br. at 15). Notably, these hypotheticals bear no relevance to this investigation which involves thousands of ancient weapon projectiles, tools, and pottery excavated from numerous archaeologically meaningful sites (E.R. 51).

Austin also makes much ado about whether a certain item is of "archaeological interest" (D.Br. at 16). Importantly, this statutory modifier pertains only to "material remains of past human life or activity" not specifically identified in the statute. 16 U.S.C. § 470bb(1).¹⁴ Notably, the central collection of artifacts in this case are specifically identified in the statute as "archeological resources" -- "weapon projectiles" and "tools". 16 U.S.C. § 470bb(1). Furthermore, it is almost laughable that Austin would suggest that he was not aware that these items were of "archaeological interest" when his own crude archaeological projects plainly excavated, removed, and tagged them because they held archaeological interest for him.

His contention regarding "archeological context" similarly has no applicability to this case since that phrase modifies only "paleontological specimens" (D.Br. at 15).¹⁵

¹⁴ Section 470bb(1) of Title 16 reads, in pertinent part, that regulations setting forth which human remains are of "archaeological interest" "shall include but not be limited to: . . . pottery . . . weapon projectiles, tools . . ." (Emphasis added).

¹⁵ "[P]aleontological specimens . . . shall not be considered archaeological resources . . . unless found in an archaeological context." 16 U.S.C. § 470bb(1).

Austin further complains about the difficulty in determining whether a particular object is a "tool" within the meaning of "archaeological resource" (D.Br. at 17-18). Austin, an amateur archaeologist, and the expert government archaeologists apparently agreed that certain objects which Austin excavated and removed from the ground were "tools" within the meaning of "archaeological resources" and not mere stones. Some 2,800 artifacts were recovered in a search of Austin's trailer. Presumably, given Austin's own extensive knowledge, he did not excavate, carry, tag, and store meaningless rocks in his trailer. Instead, he excavated and removed "tools" which were "archaeological resources" as both his conduct and the expert archaeological opinions verify. Austin's own conduct serves as confirmation that what the government archaeologists claim are tools, he agrees are tools. Thus, under the facts of this case, there is no ambiguity as to whether these objects were "tools" and "archaeological resources."¹⁶

Austin attempts to equate the terminology flaws of the Antiquity Act of 1906 noted by this Court in the Diaz opinion with the terminology found in ARPA by comparing the term "antiquity" with the ARPA term "archaeological resource" (D.Br. at 14-15). Austin's equation does not add up. The Diaz facts were far different than the facts here. There the appropriate Indian paraphernalia in question was only four years old. 499 F.2d at 114. It is hardly surprising that this Court had

¹⁶ The case may come where a finder of fact may have to resolve the question as to whether an object was a "tool" within the meaning of an "archaeological resource" and whether the defendant knew it was. This is not the case.

difficulty reconciling an object so modern as an "antiquity." In passing ARPA, Congress has avoided the hard facts which unnecessarily create adverse law by placing a minimum age of 100 years on protected artifacts. In this case, many of the artifacts are believed to date back to the dawn of man's arrival on North America 12,000 years ago (E.R. 56; G.E.R. 24-33).

While under the 1906 Act "object of antiquity" was a self-defining term, Congress took great pains when it passed ARPA to make certain that the term "archaeological resource" would be clearly understood, to a great extent to avoid the problems noted by this Court in Diaz.¹⁷ For one thing, Congress made sure that certain types of common artifacts would be specifically included as archaeological resources, such as "weapon projectiles" and "tools."¹⁸

Austin also contends that the penalty provisions separating felonious conduct from misdemeanor conduct is ambiguous (D.Br. at 19). As noted, ARPA states that if the commercial or archaeological value of

¹⁷ See p. 12, supra.

¹⁸ In upholding an ordinance prohibiting the sale of drug paraphernalia in proximity to literature promoting the use of illicit drugs, the Supreme Court in Village of Hoffman Estates v. Flipside, 455 U.S. 489, 502-02 (1982) held that the term "designed for use" was "sufficiently clear to cover at least some of the items" in that case and further commented that "whether further guidelines, administrative rules or enforcement policy will clarify the more ambiguous scope of the standard in other respects is of no concern in this facial challenge." The Tenth Circuit distinguished the Diaz decision on its facts in upholding terms such as "ruin" and "object of antiquity" against claims of vagueness, Antiquities Act prosecution involving the excavation of 800 year old Indian burial grounds. United States v. Smyser, 596 F.2d 939 (10th Cir. 1979).

the illegally removed archaeological resource or the cost of the restoration and repair of such resources and of the site exceed \$5,000, the conduct is felonious. 16 U.S.C. § 470ee(d). Among the formulas for determining "archaeological value" are the "costs of the retrieval of the scientific information which would have been obtainable prior to the violation." 43 C.F.R. § 7.14(a). The archaeological value at the Luna Lava Butte site under this formula was over \$26,000, the amount of money which it would have cost to excavate and remove these artifacts properly and professionally (E.R. 57). There is no ambiguity in the division between felonious and misdemeanor conduct under the statute or in this case.

b) Constitutional Principal Governing Austin's
Conduct: ARPA Adequately Informed Austin
that His Specific Conduct was Unlawful:
Nothing More is Required

The Supreme Court has upheld against claims of vagueness and overbreadth a state statute, which prohibited some state employees from directly or indirectly participating in certain political activities. Broadrick v. Oklahoma, 413 U.S. 600 (1973). In doing so, the Court set forth many principles forcefully applicable to this case:

Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. . . . These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws. . . .

* * *

It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society. . . . As a corollary, the Court has altered its traditional rules of standing to permit--in the First Amendment area--attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity. . . . Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.

* * *

Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. . . . Additionally, overbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment, but doing so in a neutral, noncensorial manner. . . .

* * *

[F]acial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct--even if expressive--falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some

unknown extent, there comes a point where that effect--at best a prediction--cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. . . . To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. . . .

413 U.S. at 610-16 (emphasis added).

To survive a vagueness challenge, "a penal statute [must] define the criminal offense with sufficient definiteness [so] that ordinary people can understand what conduct is prohibited and in a manner that it does not encourage arbitrary or discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357 (1983). In assessing overbreadth and vagueness challenges, a court must first determine "whether the enactment reaches a substantial amount of constitutionally protected conduct." Village of Hoffman Estates v. Flipside, 455 U.S. 489, 494-95 (1982).

This Court observed that as a general rule a person "who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." United States v. Hutson, 843 F.2d 1232, 1234 (9th Cir. 1988) (quoting from Flipside, 455 U.S. at 494-95. Austin does exactly that in posing hypotheticals unrelated to this case. This Court has also noted that ordinary canons of judicial restraint do not permit a party whose particular conduct is adequately described by a criminal statute "to attack [the statute] because the language would not give similar fair warning with respect to

other conduct which might be within its broad and literal ambit."
Schwartzmiller v. Gardner, 752 F.2d 1341, 1346 (9th Cir. 1984) (quoting
from Parker v. Levy, 417 U.S. 733, 756 (1974)).

The Supreme Court in Flipside upheld an ordinance prohibiting the sale of drug paraphernalia in proximity to literature promoting the use of illicit drugs, stating that "perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent standard should apply." 455 U.S. at 499. If it does not, then the statute must be upheld unless it "is impermissibly vague in all its applications." 455 U.S. at 498. If a statute does not implicate such constitutionally protected activity, a court must only determine whether the statute is sufficiently precise to serve the goals of "fair notice and fair enforcement" in that particular case. Id. at 498.

This Court in recent years has followed the Broadrick principles in upholding a statute criminalizing intimidation of individuals aiding minorities in finding housing, stating in language applicable to this case:

Words inevitably contain germs of uncertainty.
. . . Imprecision in penal legislation should be
tolerated if the language can be said
nevertheless to give fair notice to those who
might violate it. . . .

* * *

In Broadrick the Court reasoned that the function of overbreadth adjudication "attenuates as the

otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct--even if expressive--fails within the scope of otherwise valid criminal laws. . . ." Id. at 615, 93 S.Ct. 2917. Where conduct and not merely speech is regulated, the Court requires "that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Id. Overbreadth scrutiny is less rigid when the questioned legislation regulates "conduct in the shadow of the First Amendment, but do[es] so in a neutral, noncensorial manner." Id. at 614, 93 S.Ct. at 2917.

United States v. Gilbert, 813 F.2d 1523, 1530 (9th Cir. 1987).

ARPA clearly applied to Austin's conduct. Austin's hypotheticals regarding unknown others are irrelevant in determining ARPA's constitutionality as applied to him.

- c) Regulation of Austin's Excavation of Artifacts Without a Permit is not Traditional First Amendment Activity Subject to a Facial Vaqueness Analysis

Austin contends that his excavation of archaeological sites on public lands without a permit is a constitutionally protected academic freedom akin to free speech, D.Br. at 12-13, and, accordingly, the court should analyze the ARPA statute under the stricter facial voidness standard. Broadrick v. Oklahoma, 413 U.S. at 611-16; Kolender v. Lawson, 461 U.S. 352, 358-59, n.8 (1983) (California vagrancy statute requiring persons to provide credible identification). This argument is without merit.

To determine whether Austin's conduct is entitled to First Amendment protection, a court must consider "the nature of plaintiff's activity, combined with the factual context and environment in which it

was undertaken." Spence v. Washington, 418 U.S. 405, 409-10 (1974) (Alteration of United States flag to include peace symbol for the obvious purpose of making a statement). It is only if a person shows "[a]n intent to convey a particularized message . . . and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it," id. at 410-11, that the activity falls within the scope of the First Amendment. In this case and under this standard, it is clear that Austin's conduct does not rise to constitutionally recognized First Amendment activity. Austin was not attempting "to convey a particularized" message except in the most attenuated sense. He was amassing artifacts from archaeologically significant sites for his own unknown reasons. Notably, it is only Austin himself who claims that this venture was done for academic or noble reasons (G.E.R. 40-41). The cache of over 2,800 artifacts was not being shared "academically" or otherwise with anyone. Furthermore, as the archaeologists noted in their letter to the district court, his digging did not foster academic interests; instead, it destroyed them (G.E.R. 34-35). Native American leaders also in their letters to the court stated that Austin's conduct was not preserving their interests; rather, it was desecrating them (G.E.R. 42-46). To extend First Amendment protection to this activity stretches that amendment well beyond its breaking point. It is not even worthy of being described as "in the shadow of the First Amendment"; it is outside the umbrage.

Austin cannot loosely invoke the shibboleth of academic freedom in an effort to justify his unlawful excavation activities and

thereby fall under the extended protection of the First Amendment's freedom of speech. Courts have long held that every type of conduct which may have some ultimate First Amendment purpose does not necessarily merit First Amendment protection. In the leading case of United States v. O'Brien, 391 U.S. 367 (1968), the Supreme Court upheld a conviction when a defendant burned his selective service card to protest this country's involvement in the Vietnam war. The Court set forth this test in holding that a law prohibiting destruction of a draft card, even one destroyed in protest, was constitutional:

[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377. The Court further noted that it "cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends to express an idea."

Id. at 376. The Court added that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." Id.

Applying these criteria here, manifestly, the government has the constitutional power to regulate excavation and removal of valuable--nay invaluable--artifacts from federal land. In doing so, the government furthers the substantial governmental interest in preserving

our posterity as a species for study by those qualified to do so for the benefit of all. The governmental interest in preserving these artifacts is plainly unrelated to any suppression of free speech. Insofar as it infringes any arguable First Amendment rights, it does so only to the extent necessary to further that interest.¹⁹

This Court has held that an Idaho statute prohibiting the performance of "lewd and lascivious" acts on a child "does not impinge on or 'chill' any constitutionally protected conduct, substantial or otherwise." Schwartzmiller v. Gardner, 752 F.2d 1341, 1348 (9th Cir. 1984). In upholding an extortion statute against a claim of vagueness and overbreadth, this Court has further observed that a facial challenge to a statute is "'strong medicine' to be employed 'sparingly and only as a last resort.'" United States v. Hutson, 843 F.2d 1232, 1234 (9th Cir. 1988).

The Tenth Circuit has summarily rejected a defense vagueness claim that archaeological activity raised "the deprivation of any First Amendment right" in a prosecution under the Antiquities Act of 1906. United States v. Smyer, 596 F.2d 939, 941 (10th Cir. 1979).

The Sixth Circuit has refused to apply a facial vagueness analysis to a teacher fired for "unbecoming" conduct for showing a controversial film to her students, holding that such an act was not

¹⁹ For example, the statute and regulations provide for the excavation and removal of such artifacts under the supervision of professionals qualified to do so for placement in educational institutions to further the overall interest of gathering knowledge about our past. 16 U.S.C. § 470cc. Such a plan responsibly furthers the gathering of academic knowledge about our past.

"expression protected by the First Amendment" further noting that "such conduct . . . is not 'speech' in the traditional sense of the expression of ideas through use of the spoken or written word" and that "conduct is protected by the First Amendment only when it is expressive or communicative in nature." Fowler v. Board of Educ. of Lincoln County, Ky., 819 F.2d 657, 662-64 (6th Cir. 1987).²⁰ (Emphasis in text)

The Eighth Circuit has observed that it is not every type of academic exercise that invokes First Amendment considerations:

Certainly the First Amendment must have preeminence. It is phrased in absolute terms ("Congress shall make no law . . ."), and, although the Supreme Court has held that First Amendment rights are not absolute, and that they may in appropriate cases be overridden by "compelling" state interests, still speech, as that term is used in the First Amendment, has a preferred position in our constitutional scheme. The courts must be alert both to preserve this preferred position, and to confine it to the area intended by the Framers of the Bill of Rights. If any sort of conduct that people wish to engage in is to be considered "speech" simply because those who engage in conduct are, in one sense, necessarily expressing their approval of it, the line between "speech" protected by the First Amendment and conduct not so protected will be destroyed. We decline to adopt such a view. In short, we hold that the sort of dancing that plaintiffs advocate in this case is not "speech" under the First Amendment, and therefore that the First Amendment has not been violated by the refusal of the school board to allow its property to be used for this sort of dancing.

²⁰ While it is true that courts have recognized the importance of academic freedom and an instructor's right to express ideas, Keyishian v. Board of Regents of University of New York, 385 U.S. 589 (1967), nothing in the case law suggests that an individual's desire to attain knowledge in and about the world as he sees fit, even to the clear detriment to others, rises to the same level of protection.

Jarman v. Williams, 753 F.2d 76, 78 (8th Cir. 1985) (Emphasis added).

Under this authority, this Court need only determine whether ARPA as applied to Austin's activity adequately informed him that his conduct was unlawful. It plainly did so, specifically informing him that the excavation and removal of weapon projectiles and tools from public lands without a permit was a crime.

d) The Mens Rea Requirement of this Statute
Further Mitigates Any Vagueness Concerns

These principles hold even greater force where, as here, there is a mens rea element to this offense, requiring the government to establish that Austin "knowingly" excavated and removed these artifacts from public lands without a permit. The evidence here is overwhelming that Austin knew that he was removing archaeological resources from public lands without a permit. The Supreme Court observed in its Flipside opinion "that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." 455 U.S. at 499. As this Court noted in an involuntary servitude prosecution raising a claim of vagueness, "it is difficult to argue that a person did not have notice that certain conduct was illegal when the offense requires that the conduct be improper or wrongful and that the actor intend that the conduct have a coercive effect." United States v. Mussry, 726 F.2d 1448, 1455 (9th Cir. 1984).

Austin complains that a person digging for exempt materials such as rocks or paleontological specimens not in an archaeological

context, 16 U.S.C. §§ 470kk and 470bb, could be convicted for excavating, removing, or damaging an archaeological resource (D.Br. at 18-19). For Austin to suggest that his cache of over 2,800 artifacts was the product of unintentional conduct is clearly not credible. However, the short answer to his hypothetical claim is that a person could not be convicted if his conduct affecting those archaeological resources was inadvertent because the law requires such conduct to be a knowing violation. 16 U.S.C. §§ 470ee(d).²¹ Thus, under this case law noted, the mens rea requirement of the statute protects individuals such as the defendant from being convicted for unwitting acts.

B. The Prosecution Properly Sought New Charges in Superseding Indictments in this Case

1. Standard of Review

This Court reviews claims of vindictive prosecution to determine if the trial court was clearly erroneous or abused its discretion in finding that there was no vindictiveness. United States v. Osif, 789 F.2d 1404, 1405, n.1 (9th Cir. 1986); United States v. Spiesz, 689 F.2d 1326, 1329 (9th Cir. 1982); but see United States v. Martinez, 785 F.2d 663, 666 (9th Cir. 1986).

2. Argument

Austin argues that the bringing of additional charges in superseding indictments after he had filed motions to dismiss and elect

²¹ Congressional history indicates that "a person could be convicted if he acted of his own volition and was aware of the acts he was committing." Act of October 31, 1979, Pub. L. No. 96-95, 1979 U.S. Code Cong. & Admin. News (93 Stat.) 1714.

in response to the original indictment presumptively raises an inference that the new indictment was motivated by prosecutorial vindictiveness (D.Br. 20-25).

There is a serious threshold question here whether the defense claim of vindictiveness is moot insofar as Austin was convicted of an ARPA count, which appeared in the original indictment. This Court held in United States v. Hollywood Motor Car Co., 646 F.2d 384, 388-89 (9th Cir. 1981), rev'd on other grounds, 458 U.S. 263 (1982), that even if additional charges are dismissed due to prosecutorial vindictiveness, the government may nevertheless proceed on the original charges.²²

This superseding indictment was obtained for the simplest of reasons: the prosecutor discovered a case in his research while preparing to respond to Austin's motion to elect which informed the prosecutor that he had available a third theory of prosecution not previously known to him. The prosecutor discovered in his research United States v. Jones, 607 F.2d 269, 271-73 (9th Cir. 1979), an archaeological theft case arising in this Circuit and omitted from the defense trial memorandum, which stands for the proposition that not only may the government prosecute an archaeological act count and a general theft count at the same time but it may proceed under a third theory --

²² This point seems particularly apt where Austin accepted a plea bargain which was more advantageous to him than superior to the plea offer he rejected after the initial charges were brought. See p. 38, infra.

degradation of government property under 18 U.S.C. § 1361.²³

This reason for procuring the superseding indictment -- to add deprecation counts to the indictment, was explained in the government's response to Austin's pre-trial motions (G.E.R. 10) and repeated to the court at the April 11, 1988 hearing (R.T. 14-16).

The district court accepted these representations (E.R. 29-30) and applied the principles of United States v. Goodwin, 102 S.Ct. 2485 (1982), holding that there was no presumptive or actual prosecutorial vindictiveness here (E.R. 27-30). The district opinion reads in relevant part:

The Supreme Court has considered the application of the presumption in a pretrial situation and found that it applies only where a reasonable likelihood of vindictiveness exists. United States v. Goodwin, 102 S.Ct. 2485, 2492 (1982). In Goodwin, the Court stated "(i)n the course of preparing a case for trial the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the United States has broader significance." Id. Further, the court considered whether every case should be considered complete at the initial charging and thus require that prosecutors attempt to place every conceivable charge against an individual on the public record at the outset. Id. at 2493 n. 14. The court stated that this would require a presumption of prosecutorial infallibility and the court held there were advantages in avoiding such a rule. Id.

²³ The opinion rejected the defense claim that the Antiquities Act of 1906, previously declared unconstitutional in Diaz by this Court, was the sole preemptive criminal cause of action in archaeological theft cases. 607 F.2d at 272-73. The government was allowed to proceed under theft and deprecation theories.

(E.R. 28-29) (Emphasis added).

The Fifth Circuit en banc in United States v. Krezdorn, 718 F.2d 1360, 1364-65 (5th Cir. 1983), held that a prosecutor can counter a claim of vindictiveness raised by a superseding indictment by, among other reasons, a "mistake or oversight in his initial action." That was done here (E.R. 29-30).

While the defense attempts to distinguish the new factual information in Goodwin from the new legal information discovered here, the district court wisely rejected that distinction:

Here, the defendant urges me to follow a Ninth Circuit case decided before Goodwin. United States v. Ruesga-Martinez, 534 F.2d 1367 (9th Cir. 1976). In Ruesga-Martinez the court held that the inexperience of the prosecutor was not a valid excuse for failure to bring more serious charges in the first indictment. Id. at 1370. Defendant contends there is a difference in the situation of a prosecutor who obtains further legal knowledge from the situation where the prosecutor obtains further factual knowledge. Thus, defendant contends that the presumption of prosecutorial vindictiveness is established where the prosecutor brings further charges after acquiring additional legal knowledge.

The situation at hand is the same or at least analogous to the situation in Goodwin where in the course of preparing a case for trial the prosecutor uncovers additional information that suggests a basis for further prosecution or simply realizes that information possessed by the government has broader significance. I am not persuaded by Ruesga-Martinez and the defendant's contentions in light of the analysis in Goodwin. In Goodwin the Supreme Court did not distinguish between newly acquired factual and legal knowledge, instead the Court considered the acquisition by the prosecutor of new or further "information." Thus, I find that the presumption of prosecutorial vindictiveness was not met where

a prosecutor sought a superseding indictment based on information brought to his attention during research on defendant's motions to dismiss for statutory vagueness.

(E.R. 29-30) (Emphasis added). This Court should do the same.

In language particularly appropriate to this case, this Court has also observed that a "link of vindictiveness cannot be inferred simply because the prosecutor's actions followed the exercise of a right, or because they would not have been taken but for the exercise of a defense right." United States v. Gallegos-Curiel, 681 F.2d 1164, 1168 (9th Cir. 1982). In a case which involved the filing of felony charges against an alien for illegal entry after he pled not guilty to a misdemeanor, this Court stated that "departures from the initial indictment do not raise presumptions of vindictiveness except in a rare case." Id. at 1170. The opinion adds:

Vindictiveness is antithetical to a fair evaluation of the case. If an objective assessment of the prosecution's position reveals that charges should be increased or made more precise to take account of information not previously known to the prosecutor or to state more accurately the Government's position, then the prosecution has the right, if not the duty, to do so, provided there is no procedural unfairness to the defendant, see id. at _____, _____ & n.14, 102 S.Ct. at 2493 & n.14; Griffin, 617 F.2d at 1348. It is only when prosecutorial actions stem from an animus toward the exercise of a defendant's rights that vindictive prosecution exists.

Id. at 1169 (Emphasis added). See also United States v. Cole, 755 F.2d 748, 758 (11th Cir. 1985) (Even when "the prosecutor was in possession of this evidence at the time of the original indictment," a superseding indictment adding additional counts did "not give rise to a presumption

of prosecutorial vindictiveness.").

In a case where a defendant was acquitted in one district and thereafter indicted on a distinct but vaguely related charge in another district, this court recognized that vindictiveness is much less likely to exist in a pretrial setting than in a post-trial setting. United States v. Martinez, 785 F.2d 663, 668-69 (9th Cir. 1986) ("Thus, if a prosecutor faced with a disappointing result, acts so as to 'up the ante' for the defendant, the presumption of vindictiveness arises and must be rebutted if the government is to prevail.").

To accept the premise that a prosecutor must bring all potentially viable legal theories in his first visit to the grand jury or labor under a presumption of vindictiveness if he returns to the grand jury is simply not fair nor is it good public policy. This is especially true in pioneering prosecutions such as this one. This Court will be the first to decide the constitutionality of the very important ARPA statute. There is virtually no case law dealing with prosecutions under ARPA and little under archaeological theft statutes in general. The prosecutor here was to a great extent blazing unmapped territory. To require him to recognize all the contours of these prosecutions by the time he first visits the grand jury would be unfair and unwise.²⁴

²⁴ The defense states that the oversights or inexperience of the prosecutor is no excuse (D.Br. 23-24). The prosecutor in this case is neither a neophyte nor an unskilled advocate. He has worked as an Assistant United States Attorney in Chicago and Eugene for nine years. He was the Chief of Special Prosecutions in Cook County, Illinois from 1981-85, where he participated in many complex investigations, including the Greyford probe into judicial corruption. Despite his extensive prosecutorial experience, he was not "infallible" in his knowledge regarding all possible charges.

A precedent such as that proposed by the defense would encourage defense counsel to file every marginally meritorious motions in an effort to cut off the prosecutor even in his appropriate returns to the grand jury. Conversely, it would inhibit prosecutors from returning to the grand jury to obtain appropriate additional charges after motions have been filed out of concern that this act would be considered vindictive. As a corollary, prosecutors would be encouraged to bring every remotely valid charge at the initial presentation to the grand jury.

The Supreme Court in Goodwin spoke to these policy considerations and practicalities:

A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct. As we made clear in Bordenkircher, the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution.

102 S.Ct. at 2493. The opinion elaborated on this point:

We recognize that prosecutors may be trained to bring all legitimate charges against an individual at the outset. Certainly, a prosecutor should not file any charge until he has investigated fully all of the circumstances surrounding a case. To presume that every case is complete at the time an initial charge is filed, however, is to presume that every prosecutor is infallible--an assumption that would ignore the practical restraints imposed by often limited prosecutorial resources. Moreover, there are certain advantages in avoiding a rule that would compel prosecutors to attempt to place every

conceivable charge against an individual on the public record from the outset.

Id. at n.14. The decision also saw the compelling public policy persuasiveness of its prior decision in Bordenkircher, upholding the threat of additional charges if a defendant chooses not to plead guilty to superseding indictments in general:

Whether "additional" charges were brought originally and dismissed, or merely threatened during plea negotiations, the prosecutor could be accused of using those charges to induce a defendant to forgo his right to stand trial. . . . Thus, to preserve the plea negotiation process, with its correspondent advantages for both the defendant and the State, the Court in Bordenkircher held that "additional" charges may be used to induce a defendant to plead guilty.

* * *

The decision in Bordenkircher also was influenced by the fact that, had the Court recognized a distinction of constitutional dimension between the dismissal of charges brought in an original indictment and the addition of charges after plea negotiation, the aggressive prosecutor would merely be prompted "to bring the greater charge initially in every case, and only thereafter to bargain." Id., at 368, 98 S.Ct., at 670 (BLACKMAN, J., dissenting). The consequences of such a decision often would be prejudicial to defendants, for an accused "would bargain against a greater charge, face the likelihood of increased bail, and run the risk that the court would be less inclined to accept a bargained plea." Ibid. Moreover, in those cases in which a defendant accepted the prosecution's offer, his reputation would be spared the unnecessary damage that would result from the placement of the additional charge on the public record.

102 S.Ct. at 2491-92, n.10.

Experienced defense counsel's point, that Austin's potential incarceration rising from 64 years to 177 years in the new indictment is

evidence of vindictiveness, is disingenuous (D.Br. 20) (E.R. 21). It is obvious to anyone familiar with the criminal justice system that as a practical matter Austin would not be subject to more than two years incarceration in a case such as this, no matter how many counts he was convicted of. Austin in fact received a better deal after he had fully litigated these motions than the initial offer prior to the filing of motions. In the end, he was afforded the opportunity to preserve these issues on appeal through the mechanism of a stipulated facts trial as compared to the original offer to plead to one ARPA count without trial motions or appellate litigation (E.R. 20). If anything, there is prosecutorial accommodation at work here rather than prosecutorial vindictiveness.²⁵ Cf. United States v. Osif, 789 F.2d 1404, 1405 (9th Cir. 1986) ("[T]he vindictive prosecution doctrine does not apply when neither the charge's severity nor the sentence is increased."); Vardas v. Estelle, 715 F.2d 206, 213 (5th Cir. 1983) (There can be no vindictiveness when potential maximum sentence at first trial greater than second trial).

²⁵ During the course of these proceedings, there appeared to be some confusion as to whether the defense theory is based upon vindictiveness, resulting from broken down plea negotiations (E.R. 19-21) or vindictiveness resulting from the assertion of rights through the filing of motions (R.T. 9-23). Insofar as the defense asserts broken-down plea negotiations as a basis, the record does not support such a claim (E.R. 29-30). However, the Supreme Court has made clear that an offer from the prosecutor to plead immediately or face more serious charges is a permissible by-product of a criminal justice system dependent upon plea bargaining, and such an offer does not create an inference of prosecutorial vindictiveness, even if a defendant is inhibited from exercising his right to trial. Bordenkircher v. Hayes, 434 U.S. 357 (1978). See also United States v. Stewart, 770 F.2d 825, 829 (9th Cir. 1985); United States v. Heldt, 745 F.2d 1275, 1280 (9th Cir. 1984).

Finally, insofar as the defense raises any inference of vindictiveness, it was plainly rebutted by the prosecutor's concession that he did not have a prior "infallible" command of the law allowing deprecation charges in such cases. United States v. Osif, 789 F.2d 1404, 1405 (9th Cir. 1986) ("Vindictiveness is not present if there are independent reasons or intervening circumstances to justify the prosecutor's action.").

VI

CONCLUSION

This Court should declare ARPA constitutional as applied to Austin's conduct.

This Court should find that there was neither the inference nor the fact of vindictiveness when the prosecutor obtained a superseding indictment.

This Court should affirm Austin's conviction for violating ARPA.

Respectfully submitted,

CHARLES H. TURNER
United States Attorney

Jeffrey J. Kent by (T)
JEFFREY J. KENT
Assistant United States Attorney

George Lara by (T)
JORGE LARA
Law Clerk

STATEMENT OF RELATED CASES

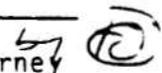
Pursuant to Rule 13(j), Rules of the United States Court of Appeals for the Ninth Circuit, the government represents it is unaware of cases related to the matter now pending before this court.

CERTIFICATE OF SERVICE BY MAIL

I HEREBY CERTIFY that I have made service of the Brief of Plaintiff-Appellee and Government's Excerpt of Record by causing to be deposited in the United States mail in Eugene, Oregon, on the 1st day of May, 1989, a true copy thereof, enclosed in an envelope with postage prepaid, addressed to:

Andrew Bates
Assistant Federal Public Defender
44 W. Broadway, Suite 406
Eugene, OR 97401

Jeffrey J. Kent

JEFFREY J. KENT
Assistant United States Attorney 

UNITED STATES of America,
Plaintiff-Appellee,

v.

Bradley Owen AUSTIN,
Defendant-Appellant.

No. 88-3300.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Oct. 31, 1989.

Decided May 2, 1990.

Defendant was convicted in the United District Court for the District of Oregon, James M. Burns, J., of excavating archaeological resources. Defendant appealed. The Court of Appeals, Tang, Circuit Judge, held that: (1) Archaeological Resources Protection Act was not unconstitutionally overbroad or vague, and (2) addition of charges before trial was not vindictive response to defendant's assertion of rights.

Affirmed.

1. Health and Environment ⇐25.5(2)

Archaeological Resources Protection Act was not unconstitutionally overbroad or vague with respect to defendant who was convicted of excavating scrapers and arrow points that were clearly weapons and tools; although defendant claimed that curiosity motivated him and academic freedom protected him, he was not affiliated with academic institution and did not claim that First Amendment protected any activity prohibited by Act; and statute provided fair notice. Archaeological Resources Protection Act of 1979, § 6(a, d), as amended, 16 U.S.C.A. § 470e(c, a, d); U.S.C.A. Const. Amends. 1, 5, 14.

2. Criminal Law ⇐37.15(1)

Addition of charges before trial after defendant asserted some right did not establish presumption of vindictiveness.

3. Criminal Law ⇐37.15(2)

Addition of charges upon discovering new law before trial was not vindictive response to defendant's assertion of rights;

902 F.2d-19

Government did not try to convict defendant regardless of merits of his challenges and agreed to stipulated-facts trial on original count.

Andrew Bates, Federal Public Defender, Eugene, Or., for defendant-appellant.

Jeffrey Kent, Asst. U.S. Atty., Eugene, Or., for plaintiff-appellee.

Appeal from the United States District Court for the District of Oregon.

Before WRIGHT, TANG and
FERNANDEZ, Circuit Judges.

TANG, Circuit Judge:

After lengthy investigation in 1986 and 1987, and subsequent searches of appellant Bradley Owen Austin's abandoned car and his house trailer, government agents seized some 2,800 Native American artifacts, excavation implements, photographs, and documents, which implicated Austin in excavating a Native American archaeological site. In February 1988, the government indicted Austin on fourteen counts. The indictment included eight counts under two subsections of the Archaeological Resources Protection Act [ARPA], 16 U.S.C. § 470ee(a) and (d):

No person may excavate, remove, damage, or otherwise alter or deface, or attempt to excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands or Indian lands unless such activity is pursuant to a permit ... [or] exemption....

16 U.S.C. § 470ee(a). The statute defines an archaeological resource as

any material remains of past human life or activities which are of archeological interest, as determined under uniform regulations promulgated pursuant to this chapter. Such regulations containing such determination shall include, but not be limited to: pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or

any portion or piece of any of the foregoing items.

16 U.S.C. § 470bb(1).

Any person who knowingly violates, or counsels, procures, solicits, or employs any other person to violate, any prohibition contained in subsection (a), (b), or (c) of this section shall, upon conviction, be fined not more than \$10,000 or imprisoned not more than one year, or both: *Provided, however,* That if the commercial or archaeological value of the archaeological resources involved and the cost of restoration and repair of such resources exceeds the sum of \$500, such person shall be fined not more than \$20,000 or imprisoned not more than two years, or both.

16 U.S.C. § 470ee(d) (emphasis in original). The indictment also included five counts under 18 U.S.C. § 641 (government property theft)¹ and one count under 21 U.S.C. § 844 (simple possession of a controlled substance).

Austin pleaded not guilty and moved for dismissal of the ARPA counts on the ground that ARPA is unconstitutionally vague. The government then filed a twenty-five count superseding indictment, which added three counts of government property theft under 18 U.S.C. § 641 and eight counts of government property depredation in violation of 18 U.S.C. § 1361.² Austin again pleaded not guilty and moved to dismiss on the ground of prosecutorial vindictiveness. The government subsequently filed a second superseding indictment adding six more counts under the same statutes.

Austin and the government agreed to a stipulated-facts bench trial on count 18 of the second superseding indictment, which charged Austin under ARPA with excavating "archaeological resources in an ar-

1. Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof....

Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both....

18 U.S.C. § 641.

chaeological site, including obsidian weapon projectile points and tools such as scrapers." By agreement, the government dismissed the other counts. Austin was convicted. He appeals on the grounds that ARPA is unconstitutionally overbroad and vague and that he was vindictively prosecuted.

I. Is ARPA unconstitutionally overbroad?

[1] "In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail." *Schwartzmiller v. Gardner*, 752 F.2d 1341, 1346 (9th Cir.1984) (quoting *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362 (1982)).

Austin's argument is creative. He argues that because curiosity motivated him, his activity was academic, and that academic freedom therefore protects him. Because academic freedom "long has been viewed as a special concern of the First Amendment," *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312, 98 S.Ct. 2733, 2759, 57 L.Ed.2d 750 (1978) (opinion of Powell, J.), Austin concludes that he may challenge ARPA as overbroad.

Academic freedom's aegis, however, does not protect Austin's excavating. Austin has not demonstrated that he is affiliated with any academic institution, nor has he posited how his own curiosity is otherwise academic.

To succeed on a claim of overbreadth where conduct and not merely speech is involved, Austin must argue that ARPA at least ambiguously reaches protected activi-

2. Whoever willfully injures or commits any depredation against any property of the United States, or of any department or agency thereof ... shall be punished as follows:

If the damage to such property exceeds the sum of \$100, by a fine of not more than \$10,000 or imprisonment for not more than ten years, or both.

18 U.S.C. § 1361.

ties and that the overbreadth is substantial. See *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S.Ct. 2908, 2917, 37 L.Ed.2d 830 (1973). Not only does Austin not claim that the First Amendment actually protects any activity that ARPA reaches, he does not even suggest its relevance to any activity except his own excavating. Therefore, he has not shown that ARPA is unconstitutionally overbroad.

II. Is ARPA unconstitutionally vague?

After overbreadth analysis, the court should

"examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."

Schwartzmiller, 752 F.2d at 1346 (quoting *Flipside*, 455 U.S. at 494-95, 102 S.Ct. at 1191).

Whether Austin can successfully challenge ARPA as vague depends on whether defendants would have "had fair notice that the conduct that [he] allegedly engaged in was prohibited." *United States v. Musry*, 726 F.2d 1448, 1454 (9th Cir.), cert. denied, 469 U.S. 855, 105 S.Ct. 180, 83 L.Ed.2d 114 (1984). Austin was charged with and convicted of excavating scrapers and arrow points. Although he contends that "weapons" and "tools" are ambiguous terms, we are not here concerned with the vagueness of the law as applied to the conduct of others. See *Schwartzmiller*, 752 F.2d at 1346. As to Austin, there can be no doubt nor lack of fair notice that the scrapers and arrow points for which he was convicted are indeed weapons and tools. The statute provided fair notice that it prohibited the activities for which Austin was convicted. His vagueness challenge therefore fails.

3. Austin does not argue that the government added the charges partly to induce Austin to plead guilty. Cf. *Bordenkircher v. Hayes*, 434

III. Vindictive Prosecution

[2] Austin argues that because the government twice added charges to his indictment after he challenged his initial indictment, he established a presumption of vindictive prosecution that the government had the burden of rebutting. We disagree. That the prosecution adds charges pretrial after a defendant asserts some right does not establish a presumption of vindictiveness. See *United States v. Goodwin*, 457 U.S. 368, 381, 102 S.Ct. 2485, 2492, 73 L.Ed.2d 74 (1982).

[3] Our inquiry, however, does not end there. As we understand it, Austin and the government do not disagree over the prosecutor's motives but rather dispute whether those motives are properly characterized as vindictive. Both agree that the prosecutor's discovery of new law occasioned the charge increase.³ Austin contends that this implies vindictiveness. We disagree.

There may be a suggestion that the prosecution evinced an extralegal animus against Austin by continuing to prosecute him, and indeed adding charges, even when it came to doubt the validity of the charges on which it based its original decision to prosecute. But the record indicates that the government did not doubt that its charges were valid. It did not try to convict Austin regardless of the merits of his challenges. Quite to the contrary, it agreed to a stipulated-facts trial on the ARPA count alone. If Austin's constitutional challenge had been valid, he would have been acquitted. The prosecution was not vindictive.

AFFIRMED.



U.S. 357, 363-65, 98 S.Ct. 663, 667-69, 54 L.Ed.2d 604 (1978).

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	CIVIL NO.
)	
TWO HANDHELD WANDS,)	
FIVE RECTANGULAR TABLITAS,)	
ONE ROUND TABLITA,)	
ONE CARVED WOODEN HOLDER,)	
NINE PERFORATED GOURDS,)	
FOUR CORN HUSK WRAPS,)	
ONE BOW,)	
ONE BONE WHISTLE,)	
TWO PAINTED ARROWS,)	
EIGHT PAINTED WOODEN FEATHERS,)	
THREE BASKETS, a/k/a)	
THE PALLUCHE CANYON COLLECTION)	
)	
Defendant.)	

COMPLAINT FOR FORFEITURE IN REM

COMES NOW the United States of America, by and through its attorneys, William L. Lutz, United States Attorney for the District of New Mexico, and Stephen R. Kotz, Assistant United States Attorney for said District, and files its Complaint for Forfeiture in Rem against the Defendants Two Handheld Wands, Five Rectangular Tabilitas, One Round Tablita, One Carved Wooden Holder, Nine Perforated Gourds, Four Corn Husk Wraps, One Bow, One Bone Whistle, Two Painted Arrows, Eight Painted Wooden Feathers, Three Baskets, a/k/a Palluche Canyon Collection (hereinafter referred to as Defendant Palluche Canyon Collection), and for its cause of action alleges and states:

1. This Complaint is filed by the Plaintiff United States of America in its own right as a sovereign power for the forfeiture of the Defendant Palluche Canyon Collection.

2. This Court has jurisdiction over this cause of action under 28 U.S.C. §1345 and 1355, and this Court has venue over this cause of action under 28 U.S.C. §1395.

3. The Defendant Palluche Canyon Collection was excavated and removed from a small cave designated as LA6532 located on public lands in Township 25 N, Range 7 W, Section 3, County of Rio Arriba, State of New Mexico, in violation of 16 U.S.C. §433 and subsequently sold, purchased, exchanged, transported or received in violation of 16 U.S.C. 470ee(b)(2).

4. The Defendant Palluche Canyon Collection is an archaeological resource of Native American Pre-historic origin within the meaning of 16 U.S.C. §470ee and 16 U.S.C. §470gg and is therefore subject to forfeiture to the United States of America pursuant to 16 U.S.C. §470ee(b)(2) and 16 U.S.C. §470gg(b)(3).

5. Special Agent Gary Lee Olson of the Bureau of Land Management has investigated the circumstances surrounding the removal and subsequent transfer of the Defendant Palluche Canyon Collection. Agent Olson determined that the Defendant Palluche Canyon Collection was being offered for sale by the Morning Star Gallery in Santa Fe, New Mexico, and is the second part of a cache which was removed from site LA6532 referred to above. The first part of the cache is being curated at the Laboratory of

Anthropology, Museum of New Mexico, in Santa Fe, New Mexico.

Agent Olson made his determination by comparing the cache at the Laboratory of Anthropology with the Defendant Palluche Canyon Collection being offered for sale by the Morning Star Gallery. To conduct this comparison, Agent Olson went with BLM State Archaeologist, Stephen Fosberg, to view the Defendant Palluche Canyon Collection being offered for sale by the Morning Star Gallery. The owners of the Morning Star Gallery agreed to allow Agent Olson and Fosberg to view, inventory and photograph the Defendant Palluche Canyon Collection. Olson and Fosberg then compared the results of the photographs taken at the Morning Star Gallery with the Palluche Canyon cache held by the Museum of New Mexico. Through this comparison, Agent Olson discovered that the tablitas at the Gallery matched their counterparts at the Museum; that a single carved wooden holder found at the Gallery matched the cache at the museum; that reed material used as part of a ceremonial headdress was almost identical to reed material in the Museum's collection; that the nine perforated gourds held by the Gallery were constructed of the same materials and in the same manner as gourds in the museum's collection; and that a single bow, eight painted wooden feathers and three baskets in the gallery's possession matched the cache held by the Museum.

Agent Olson also asked one of the owners of the Morning Star Gallery, Mac Grimmer, if the Defendant Palluche Canyon

Collection was part of the Palluche Canyon Collection cache being held by the Museum of New Mexico. Grimmer replied, "if it's not it will shock the world." Mr. Grimmer also outlined the ownership history of the Defendant collection from 1986 to the present. This outline disclosed that the original owners resided in the Farmington, New Mexico area and sold the Defendant Collection to an individual from Taos. This individual then sold the Defendant Collection to a "quasi-dealer" from Santa Fe, and this dealer in turn sold the Defendant Collection to the Morning Star Gallery. The gallery sold the collection to a couple from Santa Fe, New Mexico, and this couple returned the Defendant Collection to the gallery for sale by consignment.

Agent Olson determined that the Defendant Palluche Canyon Collection was part of the cache removed by Clifford Abbot from the above described public lands in 1959. When shown the photographs of the Defendant Palluche Canyon Collection, Mr. Abbot identified many of the artifacts he removed, including some of the tablitas, headdresses, a carved wooden holder, bows and arrows, gourds and the bone whistle. Mr. Abbot also identified the above described cave as a place from which he took the artifacts. Mr. Abbot also stated that half of the cache he removed was sold to the Museum of New Mexico in 1963.

To confirm that the entire cache was removed from the above described public lands, Agent Olson had Bart Olinger, a physicist from the Los Alamos National Laboratory analyze dirt

from the floor of the cave by x-ray fluorescence and compare this analysis with a sample of dirt removed from the Palluche Cache being held by the New Mexico Museum. Mr. Ollinger's analysis concluded that both specimens had the same trace elements present in the same proportions which is consistent with the dirt coming from the same locality. Further, Agent Olson confirmed that the cave was located on public land by having the Bureau of Land Management Cadastral Survey Crew survey the cave opening. The survey showed that the cave is located on public land and that it was located on public land in 1959, when the cache was first removed.

6. The above stated investigation and facts establish probable cause for the belief that the Defendant Palluche Canyon Collection being held by the Morning Star Gallery constitutes an archaeological resource which has been sold, purchased, exchanged, transported or received or has been offered for sale, purchase or exchange in violation of 16 U.S.C. §470ee(b)(2) and is therefore subject to forfeiture to the United States of America pursuant to 16 U.S.C. §470gg(b)(3).

WHEREFORE, Plaintiff United States of America prays:

1. That due process be issued to enforce the forfeiture and the Defendant Palluche Canyon Collection be seized and attached.

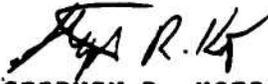
2. That each person having an interest in the Defendant Palluche Canyon Collection be admonished to an answer of the premises and give notice why the forfeiture should not be decreed.

3. That the Defendant Palluche Canyon Collection be condemned and forfeited to the United States of America and delivered into the possession of the United States Marshal for the District of New Mexico for disposition according to law.

4. That the Court grant such further and other relief as the Court may deem just and proper.

Respectfully submitted,

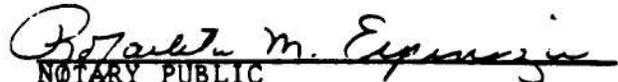
WILLIAM L. LUTZ
United States Attorney


STEPHEN R. KOTZ
Assistant U. S. Attorney
P. O. Box 607
Albuquerque, New Mexico 87103
(505) 766-3341

about its contents is supplied by an investigation conducted by him, and that the matters and things in said complaint are true to the best of his knowledge, information and belief.


GARY LEE OLSON, Special Agent
Bureau of Land Management

SUBSCRIBED AND SWORN to before me this 25th day
of April, 1989.


NOTARY PUBLIC

MY COMMISSION EXPIRES:

8/18/90

667

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 TWO HANDHELD WANDS,)
 FIVE RECTANGULAR TABLITAS,)
 ONE ROUND TABLITA,)
 ONE CARVED WOODEN HOLDER,)
 NINE PERFORATED GOURDS,)
 FOUR CORN HUSK WRAPS,)
 ONE BOW,)
 ONE BONE WHISTLE,)
 TWO PAINTED ARROWS,)
 EIGHT PAINTED WOODEN FEATHERS,)
 THREE BASKETS, a/k/a)
 THE PALLUCHE CANYON COLLECTION)
)
 Defendant.)

CIVIL NO.

WARRANT OF ARREST

THE PRESIDENT OF THE UNITED STATES OF AMERICA:

To the Marshal of the United States
for the District of New Mexico

GREETINGS

WHEREAS, a Complaint for forfeiture has been filed in the District Court of the United States for the District of New Mexico by the United States Attorney for the District of New Mexico and against the Defendant Two Handheld Wands, Five Rectangular Tablitas, One Round Tablita, One Carved Wooden Holder, Nine Perforated Gourds, Four Corn Husk Wraps, One Bow, One Bone

Whistle, Two Painted Arrow, Eight Painted Wooden Feathers, Three Baskets, a/k/a Palluche Canyon Collection, within the jurisdiction of this Court, for the reasons and causes set forth in said Complaint for forfeiture and praying that process in due form of law according to this Court issue against the aforesaid collection, and that all persons having any interest therein be cited to appear and answer the Complaint.

YOU ARE, NOW THEREFORE, HEREBY COMMANDED:

1. Pursuant to Rule E(4)(b) of the Supplemental Rules for Certain Admiralty and Maritime Claims, to take possession of the aforesaid collection for safe custody and to make a return thereof.

2. To post a written notice on the bulletin board of the United States Post Office Building, downtown branch, Albuquerque, New Mexico, directing that all persons having an interest in such property make the claim required under Rule C(6) of the Supplemental Rules for Certain Admiralty and Maritime Claims, F.R. Civ. P. before this Court within ten (10) days of the date that process is executed on the property described herein and thereafter file an answer to the Complaint within twenty (20) days following such claim.

3. To publish said notice in the Albuquerque Journal, a newspaper of general circulation published at Albuquerque, New Mexico, once a week for three (3) consecutive weeks, the publication being as soon as may be after receipt of this Order.

4. To serve a copy of this Warrant of Arrest and Complaint on an officer or agent of the Morning Star Gallery, 513 Canyon Road, Santa Fe, New Mexico.

WITNESS the Honorable _____,

JUDGE of said Court at the City of Albuquerque in the United States District Court in and for the District of New Mexico.

JESSE CASAUS, Clerk
United States District Court

FEB 17 1988

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

WESTERN DISTRICT
OF TEXAS
JUDGE DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ROBERT LUNDE,
Defendant.

) CRIMINAL NO. WSP-241A
)
) **I N F O R M A T I O N**
) (Vio: 16 USC Section 470ee(a))
)
) Unauthorized Excavation, Removal,
) Damage, Alteration, and
) Defacement of an Archaeological
) Resource

THE UNITED STATES ATTORNEY CHARGES:

COUNT ONE

(16 USC Section 470ee(a))

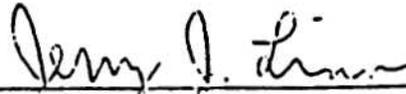
On or about November 22, 1987, within the Western District of Texas, the defendant,

ROBERT LUNDE

did intentionally, unlawfully, and without authority excavate an archaeological resource site located on the public lands of the United States at Lake Belton, Texas, United States Government Land Tract #H-726, and did intentionally, unlawfully, and without authority damage, alter, and deface said site, all in violation of Title 16, United States Code, Section 470ee(a).

HELEN MILBURN EVERSBERG
United States Attorney

BY:



JERRY J. LINN
Special Assistant U. S. Attorney

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

APR 20 1988

WESTERN DISTRICT
OF TEXAS
WACO DIVISION

UNITED STATES OF AMERICA,)	CRIMINAL NO. W88-341M
Plaintiff,)	<u>SECOND SUPERSADING</u>
)	<u>INFORMATION</u>
v.)	
ROBERT LUNDE,)	(Vio. 18 USC 13 and
Defendant.)	Texas Penal Code 28.03)
)	Criminal Mischief

THE UNITED STATES ATTORNEY CHARGES

COUNT ONE

(18 USC 13 and Texas Penal Code 28.03)

On or about November 22, 1987, within the Western District of Texas, the defendant,

ROBERT LUNDE

did intentionally or knowingly, and without the effective consent of the owner, tamper with the tangible property of the United States, causing substantial inconvenience to the Government, by tampering with an Indian archaeological resource site located on the public lands of the United States at Lake Belton, Texas, United States Government Land Tract #H-726, and such property having the value of more than \$20.00 but less than \$200.00, in violation of Title 18, United States Code, Section 13, and Texas Penal Code, Section 28.03.

Respectfully submitted,

HELEN MILBURN EVERSBERG
UNITED STATES ATTORNEY

DISASTER
↑
"Effective consent"
"idiot lawyers never asked questions"

By:

Jerry J. Linn
JERRY J. LINN
Special Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

UNITED STATES OF AMERICA,)
Plaintiff,)
v.) Criminal No. W88-340M
ROBERT LUNDE,)
Defendant.)

PLEA AGREEMENT

COMES NOW Plaintiff, the United States of America, by and through the United States Attorney for the Western District of Texas, and Defendant, ROBERT LUNDE, personally, and by and through his attorney of record, and hereby enter into the following plea agreement:

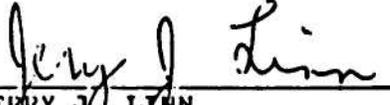
1. The Defendant, ROBERT LUNDE, will plead guilty to Count One of Superseding Information W88-340M and will persist in that plea.
- 2. With the Court's approval, the parties have agreed that a Pre-Sentence Investigation Report be waived in this matter. In addition with the Court's approval, the parties have agreed that sentencing take place at the time this plea agreement is entered with the Court.
3. This constitutes the entire plea agreement in this case and cannot be amended or modified except in open court or in writing as authorized by a representative of the United States Attorney's Office.


ROBERT LUNDE
Defendant


GENE SILVERBLATT
Attorney for Defendant

Respectfully submitted,

HELEN MILBURN EVERSBERG
UNITED STATES ATTORNEY

By: 
JERRY J. LYNN
Special Assistant U.S. Attorney

Item 2: ↑
This is important
NOT to get waived.
Waiver of this report
resulted in the
conviction in
the APP

United States District Court

WESTERN District of TEXAS
MACO DIVISION

FILED

JUN 7 1988

CLERK, U. S. DIST. COURT
BY TW DEPUTY

UNITED STATES OF AMERICA
v.

JUDGMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT

ROBERT LUNDE

Case Number W88-340H

(Name of Defendant)

Gene B. Silverblatt
Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) 1 (2nd. Superseding Information)
 was found guilty on count(s) _____ after a
 plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
18:13 and Texas Penal Code §28.03	Criminal Mischief A true copy of the original, I certify	1

CHARLES W. VAGNER
Clerk, U. S. District Court

By Mary Cunningham

The defendant is sentenced as provided in pages 2 through 3 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).
- Count(s) _____ (is)(are) dismissed on the motion of the United States.
- The mandatory special assessment is included in the portion of this Judgment that imposes a fine.
- It is ordered that the defendant shall pay to the United States a special assessment of \$ _____ which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:

451-17-7472

Defendant's mailing address:

P. O. Box 1474

Temple, Texas 76501

Defendant's residence address:

N/A

June 3, 1988

Date of Imposition of Sentence

Dennis G. Green

Signature of Judicial Officer

DENNIS G. GREEN, U. S. Magistrate

Name & Title of Judicial Officer

June 7, 1988

Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of THIRTY (30) DAYS

The Court makes the following recommendations to the Bureau of Prisons:

- The defendant is remanded to the custody of the United States Marshal.
- The defendant shall surrender to the United States Marshal for this district.

at 10:00 ^{a.m.} ~~p.m.~~ on July 1, 1988

as notified by the Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

before 2 p.m. on _____

as notified by the United States Marshal.

as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

United States Marshal

By _____

Defendant: LUNDE, ROBERT
Case Number: W88-340M

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of \$ 225.00 , consisting of a fine of \$ 200.00 and a special assessment of \$ 25.00 .

These amounts are the totals of the fines and assessments imposed on individual counts, as follows:

This sum shall be paid immediately.
 as follows:

At the direction of the Probation Office.

The Court has determined that the defendant does not have the ability to pay interest. It is ordered that:

- The interest requirement is waived.
- The interest requirement is modified as follows:

