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FILED IN UNITED STATES DISTRICT
COURT, DISTRICT OF UTAH

DEC 11 1995

MARKUS B. ZIMMER, CLERK

IN THE UNITED STATES DISTRICT COURT

DEPUTY CLERK

DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, : 94-CR-185W
 : 95-CR-97W
Plaintiff, :
 :
vs. : MEMORANDUM IN SUPPORT
 : OF MOTION FOR UPWARD
EARL K. SHUMWAY, : DEPARTURE FROM THE
 : SENTENCING GUIDELINES
Defendant. :
 :

The United States of America, by and through its undersigned counsel, hereby respectfully submits to the Court this Memorandum in Support of its Motion for Upward Departure from the Sentencing Guidelines in sentencing the defendant. This motion is based upon two separate and distinct grounds:

1. An upward departure in the defendant's offense level pursuant to U.S.S.G. § 2B1.3 comment.(n.4).
2. An upward departure in the defendant's criminal history category pursuant to U.S.S.G. § 4A1.3(e).

Each basis for upward departure will be discussed separately below. As a preliminary yet vital matter, the government invites the Court's attention to U.S.S.G. § 1B1.4 - Information to be Used in Imposing Sentence, which provides:

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In determining . . . whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. See, 18 U.S.C. § 3661. (emphasis added)

The commentary to § 1B1.4 provides this "Background:"

. . . The section is based on 18 U.S.C. § 3661 . . . (which) makes it clear the Congress intended that no limitation will be placed on the information that a court may consider in imposing an appropriate sentence under the future guideline sentencing system. A court is not precluded from considering information that the guidelines do not take into account . . . In addition, information that does not enter into the determination of the applicable guidelines sentencing range may be considered in determining whether and to what extent to depart from the guidelines . . . (emphasis added)

OFFENSE LEVEL - UPWARD DEPARTURE

The United States respectfully urges this Court to depart upward in the defendant's offense level based on the following:

1. The gross inadequacy of the Sentencing Guidelines for violations of the Archeological Resources Protection Act of 1979 (ARPA) and related archaeological resource violations.

2. The facts of the instant cases, involving the looting and damaging of three separate archaeological sites and the desecration of two prehistoric graves, not only support but mandate that full sentencing consideration be given to these intolerable criminal acts by way of upward departure.

The Tenth Circuit has established a three-step protocol for the district courts to follow whenever an upward departure is under consideration:

First, a district court must explain why the Guidelines sentencing is inadequate. Second, the court must identify the sufficient factual basis for departure.

Third, the court must explain why that specific degree of departure is reasonable.

United States v. Jackson, 921 F.2d 985, 989 (10th Cir. 1990) (en banc), citing United v. White, 893 F.2d 276, 278 (10th Cir. 1990).¹

Concerning the first criterion for upward departure, that the Sentencing Guidelines are inadequate for ARPA and related archaeological resource violations, the starting point is U.S.S.G. § 5K2.0:

Under 18 U.S.C. § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."

The Sentencing Commission itself answers this first issue in the White analysis in two separate ways:

1. ARPA is codified at 16 U.S.C. § 470aa-mm, with the criminal acts and penalties set forth in § 470ee. The Sentencing Guidelines do not reference ARPA or 16 U.S.C. § 470ee in either Appendix A, the Statutory Index, or under the "statutory provisions" section of U.S.S.G. § 2B1.3, the guideline which the Presentence Report indicates is applicable to the defendant's

¹A subsequent Supreme Court decision established a two-part departure analysis (whether sentence was imposed in violation of law, and whether the sentence imposed is reasonable). Williams v. United States, 503 U.S. 193, 201-03 (1992). The Tenth Circuit has held that it is still appropriate to engage in the White tripartite analysis since it comports with the Supreme Court's approach. United States v. Flinn, 987 F.2d 1497, 1500 (10th Cir. 1993).

three felony ARPA convictions.² In selecting § 2B1.3, the Probation Office appropriately followed the guidance of the Sentencing Commission in the introduction to Appendix A: "For those offenses not listed in this index, the most analogous guideline is to be applied. (See, § 2X5.1)."

2. A determination that § 2B1.3 is the "most analogous" guideline for ARPA does not mean that it is "adequate" for purposes of ARPA sentencing. To the contrary, the Sentencing Commission implicitly recognized that § 2B1.3 is inadequate for unique offenses such as ARPA. "In some cases, the monetary value of the property damaged or destroyed may not adequately reflect the extent of the harm caused." U.S.S.G. § 2B1.3, comment. (n.4)(emphasis added).

Thus, by the Sentencing Commission's exclusion of ARPA from Appendix A and § 2B1.3 and its inclusion of Application Note 4 in § 2B1.3, it is clear that the unique nature of ARPA and related archaeological resource violations involve "aggravating . . . circumstance(s) of a kind or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating" § 2B1.3, the most analogous guideline for ARPA. U.S.S.G. § 5K2.0.

The second criterion is that the instant cases present a factual basis for an upward departure. Reference to the evidence presented during the jury trial in case no. 95-CR-97W is all that is necessary to satisfy this second prong of the White analysis.

²U.S.S.G. § 2B1.3, by explicit Sentencing Commission designation, is the appropriate guideline for defendant's three felony convictions under 18 U.S.C. § 1361.

Although the Presentence Report briefly summarizes this evidence and that relating to case no. 94-CR-185W, the jury and this Court received the full benefit of expert testimony from two archaeologists who described in detail the multitude of dreadful harms and losses caused by the defendant's ARPA crimes. The United States submits that this expert evidence fully supports a determination by this Court that the nature and extent of the defendant's ARPA and related crimes warrant an upward departure.

How important are the archaeological resources which the defendant has looted and destroyed? In addition to the testimony of the archaeologists during the trial, the Court's attention is also invited to the Congressional findings enumerated in ARPA:

The Congress finds 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; . . .

16 U.S.C § 470aa(a) (emphasis added).

Congress also defined the purpose of the ARPA legislation:

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 . . ."

16 U.S.C. § 470aa(b).

The third criterion for an upward departure is to explain and justify the degree of departure. The Tenth Circuit advises: "When departing from the guidelines, the court should look to the guidelines for guidance in characterizing the seriousness of the

aggravating circumstances to determine the proper degree of departure." Jackson, 921 F.2d at 990. " The court need only give a reasonable methodology hitched to the Sentencing Guidelines to justify the reasonableness of the departure." United States v. Harris, 907 F.2d 121, 124 (10th Cir. 1990).

Although archaeological resources are not addressed in the Sentencing Guidelines, the Commission has specifically dealt with conservation and wildlife issues. U.S.S.G. § 2Q2.1 provides some assistance to this Court in determining the appropriate degree of departure. § 2Q2.1 deals with the Endangered Species Act, the Bald Eagle Protection Act, the Migratory Bird Treaty, the Marine Mammal Protection Act, the Wild Free-Roaming Horses and Burros Act, the Fur Seal Act, and the Lacey Act.

The base offense level for any violation of these laws is six, two levels higher than § 2B1.3. More significantly, § 2Q2.1 has a "specific offense characteristics" enhancement of four levels for offenses involving endangered species (marine mammals, fish, wildlife or plants). There is also an enhancement corresponding to the market value of the fish, wildlife, or plants involved in the violation. In addition, § 2Q2.1, Application Note 5, provides for upward departure where "the seriousness of the offense is not adequately measured by the market value."

Comparing § 2B1.3 and § 2Q2.1 results in these conclusions:

1. The Sentencing Commission made specific provisions for endangered species violations, but none for archaeological

resource violations, even though Congress has specifically found that "archaeological resources on public lands . . . are increasingly endangered . . ." 16 U.S.C. § 470aa(a).

2. Since Congress has found that archaeological resources are endangered, they should be entitled to at least the same sentencing consideration as endangered species. Thus, the four level "endangered species" enhancement under § 2Q2.1 should be the minimum degree of upward departure applicable to ARPA violations, due to the unique nature of archaeological resources not adequately considered by the Sentencing Commission (except implicitly in the upward departure suggestion in Application Note 4 to § 2B1.3)³.

This does not, however, end the issue of the appropriate degree of departure. The four level upward departure discussed above pertains to archaeological resources in general. An extremely important additional factor in the sentencing of the defendant is that the archeological resources involved in four of the six felony convictions (ARPA and § 1361) included human remains. These are entitled to special sentencing consideration not only because of their very nature, but also because of their spiritual and cultural significance to this nation's Native American community (present and future generations).

³Arguably, the two level variance between the base offense levels in § 2B1.3 and § 2Q2.1 could support an additional two level upward departure. The United States does not seek such a departure because the "endangered species" analogy reasonably addresses the inadequacy of the guidelines for archaeological resources.

The defendant's extensive desecration and defilement of prehistoric graves deserves specific consideration for sentencing purposes. The interests of justice and the victims of such reprehensible conduct deserve no less. The first factor listed in federal law for a sentencing court to consider is that the sentence be imposed "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense . . ." 18 U.S.C. § 3553(a)(2)(A). The defendant's conduct relative to human remains and prehistoric graves is a substantial part of the "seriousness of (his) offense(s)." *Id.* The degree of upward departure must take this unique factor into consideration.

The Sentencing Guidelines give some guidance on this issue. § 5K2.8 provides for upward departure based on "extreme conduct:"

If the defendant's conduct was unusually heinous, cruel, brutal or degrading to the victim, the court may increase the sentence above the guideline range to reflect the nature of the conduct . . .

The Tenth Circuit has approved an upward departure based on § 5K2.8 in a second degree murder case based on the defendant's gratuitous infliction of injury upon his victim. United States v. Kelly, 1 F.3d 1137 (10th Cir. 1993); United States v. Kelly, 28 F.3d 114, 1994 WL 209863 (10th Cir. 1994) (following remand, six level departure upheld).

The Ninth Circuit has upheld the application of § 5K2.8 in a voluntary manslaughter case where the "extreme conduct" was inflicted on the victim after death. United States v. Quintero,

21 F.3d 885, 893-895 (9th Cir. 1994) (remanded for resentencing because degree of departure not adequately explained).'

The United States respectfully suggests that at the very least, an additional four level upward departure be applied for the defendant's desecration and defilement of human remains and prehistoric graves. This suggestion is consistent with what the Tenth Circuit approved in Kelly -II. The district court in Kelly, following remand for resentencing, utilized § 2A2.2(b)(3)(C) in explaining the basis for a six level upward departure due to "extreme conduct." That guideline specifies a six level increase in an aggravated assault case involving permanent or life-threatening bodily injury. U.S.S.G. § 2A2.2(3)(B) provides for a four level increase where the assault involved "serious bodily injury".

This four level increase under § 2A2.2(b)(3)(B) is an appropriate analogy for the defendant's "extreme conduct" in pulling a burial blanket off the human remains of a prehistoric infant, and tossing the bones aside (Dop-Ki Cave, Canyonlands; counts I and II, case no. 95-CR-97W). The defendant also engaged in similar destructive conduct with prehistoric human remains at the archaeological site in case no. 94-CR-185W. Such reprehensible conduct against human remains is consistent with the "serious bodily injury" provision of § 2A2.2(b)(3)(B).

Based on the foregoing, the United States urges the Court to depart upward a total of eight levels from offense level 21 for the six ARPA/§ 1361 felonies in the two cases (PSR at para. 57).

This eight level upward departure will result in a net upward departure of six levels because it will eliminate the two level upward adjustment for multiple offense grouping under U.S.S.G. § 3D1.4 (PSR at para. 64).

CRIMINAL HISTORY CATEGORY - UPWARD DEPARTURE

Chapter Four, Part A, of the Sentencing Guidelines pertains to the sentencing court considering the "criminal history" of the defendant. The "introductory commentary" to Part A provides:

. . . General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence. To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered. Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation . . . (emphasis added)

U.S.S.G. § 4A1.3, entitled "Adequacy of Criminal History Category," provides:

If reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes, the court may consider imposing a sentence departing from the otherwise applicable guideline range. Such information may include, but is not limited to, information concerning: . . .

(e) Prior similar adult criminal conduct not resulting in a criminal conviction.

A departure under this provision is warranted when the criminal history category significantly under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit further crimes . . . The court may, after a review of all the relevant information, conclude that the defendant's criminal history was significantly more serious than that of most defendants in the same criminal history category, and therefore consider an upward departure from the guidelines . . . (emphasis added)

The Tenth Circuit has held that the similarity of a defendant's present conduct to recurrent past reprehensible behavior is an appropriate departure criterium under § 4A1.3. United States v. Jackson, 903 F.2d 1313, 1320 (10th Cir.), rev'd on other grounds, 921 F.2d 985 (10th Cir. 1990) (en banc). The court explained that departure on this ground is justified because the similarity of the defendant's criminal conduct may indicate the seriousness of the past crimes as well as the likelihood of future crimes:

The recidivist's relapse into the same criminal behavior reveals his lack of recognition of the gravity of his original wrong, entails greater culpability for the offense with which he is currently charged, and suggests an increased likelihood that the offense will be repeated again.

Id.

The Tenth Circuit has also indicated that in deciding whether to depart upward, a district court may properly consider the need to protect society from a particular defendant. See, United States v. Kalady, 941 F.2d 1090, 1099 (10th Cir. 1991); see also, 18 U.S.C. § 3553(a)(2)(C).

The United States urges this Court to depart upward from the defendant's criminal history category III, based on the foregoing provisions of the Sentencing Guidelines and the totality of the "information concerning the background, character and conduct of the defendant" (§ 1D1.4) as reliably demonstrated by:

1. The evidence seen and heard by this Court and the jury during the trial in case # 95-CR-97W, concerning not only the multiple violations of law in that case, but more

importantly, the untold number of prior violations of a similar nature committed by the defendant ("thousands of times" by his own account; PSR at para. 75); and

(2) The information set forth in the Presentence Report detailing the defendant's criminal history, lack of true remorse, and likelihood of recidivism (in particular, the "other criminal conduct" section of PSR at para. 75-78).

The inadequacy of the sentencing guidelines calculation of the defendant's criminal history category III is quite apparent. Under the guidelines, the defendant receives only one criminal history point for his felony conviction in 1986 in this very Court (the infamous "basket case"), for an egregious violation of the Archeological Resources Protection Act. The defendant receives no points for the staggering number of his other ARPA and related violations (again, he says "thousands") in which he damaged and destroyed, looted and plundered the priceless and irreplaceable archaeological and cultural treasures of this nation.

The record in this case fully supports a finding by the Court that the criminal history category computed under the guidelines "does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes." U.S.S.G. 4A1.3, p.s. "A district court has considerable discretion in appraising a defendant's criminal history. The Court may consider the defendant's present or past criminal conduct as grounds for

departure to a higher criminal history category." United States v. Jackson, 921 F.2d 985, 991 (10th Cir. 1990) (en banc) (emphasis added).

In upholding the upward departure from category VI to a higher guideline range corresponding to the career offender provision, the Tenth Circuit relied in part on the fact that the defendant's criminal history also demonstrates a pattern of criminal conduct that suggests robbery was defendant's "chosen profession". United States v. Gardner, 905 F.2d 1432, 1439 (10th Cir. 1990). Likewise, the reliable evidence before this Court demonstrates that the defendant has engaged in his life-long "chosen profession," or to use his words, "a way of life" (PSR at para. 77, sub. 2) of illegally looting archaeological sites on public lands. The inadequacy of the defendant's criminal history category III is manifest.

The Tenth Circuit approves of the use of "analogies to offense characteristic levels, criminal history categories, and other principles in the guidelines to determine the appropriate degree of departure." United States v. Roth, 934 F.2d 248, 252 (10th Cir. 1991). An appropriate analogy in this case would be the guidelines assignment of criminal history points: three points under § 4A1.1(a) "for each prior sentence of imprisonment exceeding one year and one month" and two points under § 4A1.1(b) "for each prior sentence of imprisonment of at least 60 days not counted in (a)" above. Thus, if the defendant had suffered only three other convictions for ARPA and/or related archaeological

crimes from among the "thousands" of his violations, and received the requisite prison time on each, his criminal history category would be VI. Two such convictions would equate to category V; one conviction to category IV. If the defendant's prior record involved four convictions, with only being a felony involving at least 13 months imprisonment and the other three being misdemeanors involving only 60 day jail sentences, it would likewise raise his criminal history category to VI. Cf. United States v. Yates, 22 F.3d 981, 989-990 (10th Cir. 1994) (similar analogy discussed; remanded for resentencing because the lower court did not adequately explain its methodology as to upward departure in criminal history category from III to VI).

When viewed against the backdrop of the defendant's life-long series of crimes of this nature, three felonies, or one felony and three misdemeanor convictions, are reasonable and appropriate analogies to utilize in determining the degree of upward departure. Based on the defendant's "way of life" criminal history, and the devastating effect it has had on this nation's archaeological and cultural heritage, as well as the trauma it has inflicted on the Native American community, category VI is most appropriate criminal history category for this defendant.

CONCLUSION

Based on the foregoing, the United States respectfully implores this Court to depart upward eight levels for the six ARPA/§ 1361 convictions, which will result in a net increase of

six levels and a total offense level of 29. The United States also strongly urges the Court to depart upward in the defendant's criminal history category from III to VI.

RESPECTFULLY SUBMITTED this 11 day of December, 1995.

SCOTT M. MATHESON, JR.
United States Attorney

A handwritten signature in cursive script, appearing to read "W. T. Dance", is written over a horizontal line.

WAYNE T. DANCE
Assistant United States Attorney

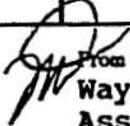
Memorandum



Subject
Earl K. Shumway
Pre-sentence Report

Date
November 3, 1995

To
James Furner
U.S. Probation Officer

From

Wayne Dance
Assistant U.S. Attorney

The following information is provided for inclusion in the defendant's pre-sentence report:

I. Damage/Loss associated with the counts of conviction under 16 U.S.C. § 470ee (Archaeological Resources Protection Act of 1979) and 18 U.S.C. § 1361 (damaging property of the United States):

A. Case No. 94-CR-185W:

1. Archaeological value: \$36,936.80.
2. Costs of restoration and repair: \$3,704.28.
 - a. Costs associated with compliance with the Native American Graves Protection and Repatriation Act (NAGPRA), to wit, consultation with lienal descendants of victimized pre-historic peoples and cultures, and the reburial of the prehistoric human remains: \$1,910.64.
 - b. Rehabilitation costs: \$1,137.02.
 - c. Damage assessment costs: \$656.62.
3. Total damage/loss (for sentencing purposes): \$40,641.08.

B. Case No. 95-CR-97W:

1. Archaeological value:
 - a. Dop-Ki Cave, National Canyonlands National Park: \$41,265.60.
 - b. Horse Rock Ruin, Manti-LaSal National Forest: \$51,358.20.

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- c. Total: \$92,623.80
- 2. Costs of Restoration and Repair: \$5,418.02.
 - a. NAGPRA costs (Dop-Ki Cave): \$1,437.62.
 - b. Rehabilitation costs:
 - (1) Dop-Ki Cave: \$351.51
 - (2) Horse Rock Ruin: \$279.59
 - (3) Total: \$631.09
 - c. Damage assessment costs:
 - (1) Dop-Ki Cave: \$1,437.23
 - (2) Horse Rock Ruin: \$1,912.08
 - (3) Total: \$3,349.31.
- 3. Total damage/loss (for sentencing purposes):
\$98,041.82.

II. Restitution:

A. Case No. 94-CR-185W: \$3,704.28.

- 1. See paragraph IA2 above. The full amount is attributable to Shumway based on his affidavit and sworn testimony presented during change-of-plea hearing on September 21, 1995, wherein he stated he was solely responsible for damage to both alcove sites. Although co-defendant Peter Verchick has pled guilty to a misdemeanor violation in this case, including aiding and abetting Shumway, it is the government's position that Verchick's restitution should not exceed \$500.00 because of the misdemeanor limits by law the amount of damage to \$500.00 or less. Thus, Shumway's portion of restitution should be \$3,704.28 less Verchick's portion thereof.

B. Case No. 95-CR-97W: \$1,806.00.

- 1. This amount of one-third of the total of \$5,418.02 set forth in paragraph IB2 above. The co-defendants of Shumway have been ordered to pay the other two-thirds.

III. Other Criminal Conduct and Related Information:

- A. Following Shumway's conviction in 1986 in the U.S. District Court of the District of Utah for a felony violation of the Archaeological Resources Protection Act of 1979, relating to his looting of approximately 35 prehistoric baskets from Horse Rock Ruin, aka Jack's Pasture in Allen Canyon, Manti-LaSal National Forest, Shumway testified under oath in the case of United

States v. Allen Buddy Black, CR-86-97, a jury trial before the Honorable Bruce S. Jenkins. Attached is a partial transcript of Shumway's testimony in that case. Shumway not only admitted his involvement in the basket looting to which he had already plead guilty, but more significantly, Shumway stated under oath that he had been digging artifacts from public land since "around the time I was five years old" (page 3, lines 17-21), and that he had engaged such conduct in San Juan County "thousands of times" (page 3, lines 22-24).

- B. Also attached is a exhibit which was used in the trial in case no. 95-CR-97W. The jury viewed a video tape of a KSL-tv documentary on looting of archaeological sites in San Juan County, Utah. The program was entitled "What Price the Past." It was telecast in 1988 and Earl Shumway was interviewed during the telecast. The attached document is a partial transcript of Mr. Shumway's interview in that documentary. It shows Shumway boasting that the chances are " a million to one" that an experienced artifact looter will get away with his crimes without being caught.
- C. In the July/August 1986 edition of "Science 86" the cover story was "Culture Thiefs" about archaeological site looting in the southwest United States. Earl Shumway is prominently depicted in a full page photograph within the story and quoted extensively. Among other things, Shumway states:
1. "My dad, that's all he's done for a living, and my grandfather was hired as a boy to dig for Kerr" (Andrew A. Kerr, University of Utah Archaeologist in the 1920's).
 2. "The first grave I ever dug was when I was three years old, and I've dug ever since. Around here it's not a crime, it's a way of life."
 3. "We use radios, we dig at night, and if we have to, we get dropped off. I dig alone most of the time. I've stayed out there digging four days and nights non-stop with one piece of jerky."
 4. The article states that "Shumway also packs a .44 Magnum" and that Shumway was "asked what he would do if discovered by authorities." Shumway is then quoted as stating: "if there ornery enough to seek up on me while I'm out there digging in the middle of nowhere, more power to them. I just don't think they'll leave the same way they came in."
 5. The article reports Shumway felony conviction in the U.S. District Court in Utah for the archaeological violation, and receiving a sentence

of five years probation. Shumway is then quoted as follows: "If the government can come down here and say we don't have the right to dig in a place where we've lived all our lives, I'd just as soon go to prison. I'm not gonna bring my kid into a world where you can't go out and dig up an old ruin."

- D. In the December 7, 1986 edition of "The New York Times Magazine" there is an article about archaeological looting in the southwest United States entitled "Raiders of the Sacred Sites." Shumway is pictured in this article holding an Anasazi pot. Shumway's "basket case" is discussed in the article which is subtitled "Spurred on By High Prices, Looters are Ransacking Sites Sacred to American Indians."

Note: The "Science 86" and the "New York Times Magazine" articles are available for review in my office and will be provided to the court at your request.

IV. Obstructing or Impeding the Administration of Justice-U.S.S.G. §3C1.1

The government contends that this enhancement should be applied to Shumway on the basis of him "providing materially false information to a judge" (Application Note 3(f)) during his plea hearing on September 21, 1995, in Case No. 94-CR-185W. Shumway testified under oath that no one else was involved in the digging of the alcoves. Verchick's sworn testimony on November 2, 1995, was to the contrary. Verchick stated that both he and Carrie Shumway were digging in Earl's presence in the alcoves. Verchick's testimony is corroborated by Carrie Shumway's statements to Agent Bart Fitzgerald on October 10, 1995, (See attached report of interview).

V. Acceptance of Responsibility-U.S.S.G. §3E1.1

The government contends that Shumway is not entitled to reduction of sentence because he has not met the requirements of §3E1.1 as to all counts for which he is being sentenced. (See United States v. Ruth, 946 F.2d 110, 113 (10th Cir. 1991); United States v. King, 36 F.3d 728, 734-35 (8th Cir. 1994)).

THE



HOPI TRIBE

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UNITED STATES
ATTORNEY Ferrell H. Secakuku
DISTRICT OF UTAH CHAIRMAN

Wayne Taylor Jr.
VICE-CHAIRMAN

11/15/95

The Honorable David K. Winder
Chief Judge, U.S. District Court
District of Utah
235 U.S. Courthouse
Salt Lake City, Utah 84101

RE: Sentencing of Earl K. Shumway; Case No. 94-CR-185W & No. 95-CR-97W

Dear Sir:

The Hopi Tribe, Hopi Cultural Preservation Office and the Cultural Resources Advisory Committee would like to take this opportunity to comment on the significance and impact of the crimes committed in this case on the Hopi Tribe.

For the Hopi Tribe, our history is part of our religion. As such, history is integrally tied to the present and is used to maintain and reaffirm all aspects of cultural identity, both spiritual and physical. The oral clan traditions recite actual events that took place in past times and places to make up what we now know as the Hopi clan migrations, traditions and history. There are many Hopi clans who settled in what is now the State of Utah who then continued on their migrations until they eventually settled on Hopi aboriginal lands. Evidence of our tracks and habitation continues into the present in the form of archaeological ruins, human remains, burials and other physical forms. The fact that these sites, places and remains may be distant from what is now recognized as the Hopi Reservation does not mean that the Hopi people have forgotten or relinquished our cultural rights and interests into these ancient places and people. Any aspect of our cultural history integrates the past, present, the future and incorporates religious concerns. Present Hopi ceremonies recognize the right of the past to remain in place, undisturbed so that aspects of the Hopi religion may be preserved and perpetuated in the present.

It is of significance to the Hopi people when an archaeological site is disturbed, items are removed, human remains are disturbed and their resting places desecrated. The impact on Hopi culture, religion and history is permanent. It cannot be remedied or replaced. These ancient places are to remain intact and undisturbed in order to fulfill religious mandates as carried out by the Hopi religious leaders. Cognizance of

the continued looting, destruction, desecration and illegal activity in these ancient places impacts on the ability of Hopi religious leaders to carry out their religious duties and the Hopi ceremonies..

These archaeological sites and places also impact the Hopi clans as the clan migration histories are lost, changed or damaged so that the present may no longer be able to relate to the past. The heritage of future Hopi generations will be lost to them.

The Hopi people are also impacted emotionally and mentally as the criminal activities cause one to worry, to feel helpless, knowing that aspects of Hopi culture, religion and history are being lost through no fault of our own.

We, the undersigned members of the Hopi Cultural Resources Advisory Committee, request that your Honor take these concerns into consideration:

Martin H. Idzington

Harold Polingyumptewa

Delton Taylor

Eddridge Kainva

Antonia

Queen Kumpewa

Robert Dreyfus

Frank Mopsis

Byron Lyona

cc: Scott M. Matheson, Jr., U.S. Attorney
G. Fred Metos, Esq.
Joseph Fratto, Jr., Esq.
Files

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 95-4201 and No. 96-4000

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

v.

EARL K. SHUMWAY,
Defendant/Appellant.

ANSWER BRIEF OF PLAINTIFF/APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION
HONORABLE DAVID K. WINDER

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ORAL ARGUMENT IS REQUESTED

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PRIOR AND RELATED APPEALS

There are no prior or related appeals.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	:	No. 95-4201
Plaintiff/Appellee,	:	No. 96-4000
vs.	:	
EARL K. SHUMWAY,	:	ANSWER BRIEF OF
Defendant/Appellant.	:	PLAINTIFF/APPELLEE
	:	

STATEMENT OF THE ISSUES

I. Did the district court abuse its discretion in admitting evidence of appellant's prior criminal conduct under Rule 404(b) Fed.R.Evid.?

II. Was the district court clearly erroneous in imposing a vulnerable/susceptible victim adjustment (U.S.S.G. § 3A1.1(b)) based on appellant's desecration of prehistoric Native American human remains?

III. Did the district court properly include the value of the archaeological resources damaged by appellant in calculating the amount of "loss" (U.S.S.G. § 2B1.1) relating to the offenses?

IV. Was the district court clearly erroneous in imposing an obstruction of justice adjustment (U.S.S.G. § 3C1.1) based on appellant's perjury and providing false information to a judge?

V. Did the district court properly depart upward one criminal history category (U.S.S.G. § 4A1.3) after determining

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that appellant had committed similar crimes "at least 100 other times?"

STATEMENT OF THE CASES

94-CR-185W (Appeal No. 96-4000): On November 16, 1994, appellant Earl K. Shumway (Shumway) was charged in a three-count indictment alleging violation of the Archaeological Resources Protection Act (ARPA) (16 U.S.C. § 470ee(a) and 18 U.S.C. § 2); a related charge of damaging property of the United States (18 U.S.C. §§ 1361 and 2); and felon in possession of a firearm (18 U.S.C. § 922(g)). (Doc. 13). On September 21, 1995, Shumway pled guilty to all three felony counts, and the government agreed not to oppose Shumway's motion to consolidate (for sentencing) this case and United States v. Earl Shumway, No. 95-CR-97W (D.Ut). (Transcript (Tr.) of Shumway's Change of Plea, 9/21/95 at 13-14)).

95-CR-97W (Appeal No. 95-4201): On June 1, 1995, Shumway was charged in a four-count indictment alleging two violations (Counts I and III) of ARPA (and U.S.C. § 2) and two related charges (Counts II and IV) of damaging property of the United States. (Doc. 1). After a jury trial, Shumway was found guilty of all four felony counts on August 2, 1995. (Doc.32).

On December 15, 1995 in a consolidated sentencing, the district court sentenced Shumway to 78 months in prison, a three-year term of supervised release, restitution in the amount of \$5,510.28, and a \$350 special assessment. (Doc. 84 (No. 94-CR-185W) and Doc. 45 (No. 95-CR-97W)).

Shumway filed timely notices of appeal in both cases (Appeal No. 95-4201 and No. 96-4000). On May 8, 1996, this Court consolidated both of appellant's direct appeals.

STATEMENT OF FACTS

Evidence at Trial (95-CR-97W) - July 31 through August 2, 1995

Nancy Coulam, Ph.D., National Park Service Archeologist, specializes in southwest archaeology, especially in the Four Corners area. Dr. Coulam provided the jury with background information regarding archaeology (the scientific study of the human past) and explained the importance of archaeological resources and the significant losses associated with any damage done to them. (Trial Transcript (TT), 7/31/95 at 3-6, 30-45). Identifying two particular Anasazi sites¹, Dop-Ki Cave and Horse Rock Ruin², which were named in the four charges against Shumway, Dr. Coulam described the devastating effects of the criminal conduct inflicted on these archaeological resources, including severe damage to the sites, deprivation to the public of these important resources³, and tremendous loss to the Native

¹Anasazi is the name assigned by archaeologists to a prehistoric culture living in the Four Corners area during the Formative Period (300 A.D. to 1300 A.D.). An archeological site is a "discrete location on the ground where people have left physical remains or some kind of physical evidence of their activities." (TT, 7/31/85 at 13-14, 17).

²Dop-Ki Cave is located in Canyonlands National Park. Horse Rock Ruin also known as Cliffdwellers' Pasture or Jack's Pasture is located in Allen Canyon, Manti-LaSal National Forest. (TT, 7/31/95 at 19, 28).

³Dr. Coulam testified that of the 700,000 visitors to Arches National Park each year, 40% or more specifically come to view archaeological sites. (TT, 7/31/95 at 44-45).

American community who hold strong religious and spiritual ties to these resources. (Id. at 25-45). Dr. Coulam concluded that the archaeological value and cost of restoration and repair at the Dop-Ki Cave site, pertaining to the damage caused by the offenses alleged in Counts I and II, amounts to \$44,493.00. (TT, 8/2/95 at 50-51).

Stanley L. McDonald, U.S. Forest Service Archeologist, testified that the archaeological value and cost of restoration and repair at Horse Rock Ruin site pertaining to the damage caused by the offenses alleged in Counts III and IV amounts to \$51,637.79. (Id. at 89). Both archaeologists testified that the calculations as to archaeological value and cost of restoration and repair were made in accordance with the requirements of federal regulations (43 C.F.R. § 7.14) which implement ARPA. (TT, 8/2/95 at 50-51, 89).

The evidence at trial proved that in the fall of 1991, Shumway met a helicopter mechanic (Michael R. Miller⁴) at a lounge and pool hall. (TT, 8/1/95 at 109). Shumway developed a relationship with Miller and asked him if he could find a helicopter pilot to fly them around southeastern Utah to find prehistoric artifacts. Lured by Shumway's talk of great financial rewards, and after Shumway extensively discussed his experience, even expertise, in archaeological matters such as

⁴Prior to testifying as a government witness, Miller pled guilty to two felony ARPA violations which were identical to the ARPA charges against Shumway in Counts I and III. (No. 95-CR-009 (D. Ut.)).

digging artifacts and selling them for lots of money, Miller eventually agreed and contacted a friend and associate (John H. Ruhl⁵) who is a helicopter pilot. (Id. 114-125).

In December, 1991, Shumway, posing as a movie scout, called Ruhl's supervisor at the helicopter company and arranged for Ruhl to fly to Moab, Utah to pick up Shumway for a movie scouting excursion. (Id. at 73-76; 125-129). Ruhl met Shumway and Miller in Moab with the helicopter. Once airborne, Shumway directed Ruhl to fly to a particular archaeological site southeast of Moab, but Shumway had trouble locating the site. During the flight, Shumway made many statements about his past artifact looting activities, with particular emphasis on baskets he had dug up and sold. (Id. at 148-153).

Unable to find the site he was searching for, Shumway eventually told Ruhl to land at an archaeological site in a remote part of Canyonlands National Park. (Id. at 152). Ruhl dropped off Shumway and Miller after agreeing to pick them up later in the day. Shumway and Miller dug for several hours at this site, identified as Dop-Ki Cave (Counts I and II). (Id. at 153-155). While digging within the cave, Miller found the remains of a prehistoric infant wrapped in a burial blanket. Shumway insisted on taking over the digging at that point. Shumway excavated the infant's remains, removed the burial blanket, and left the infant's remains uncovered on the ground.

⁵Ruhl pled guilty to a felony ARPA violation. (No. 95-CR-008 (D. Ut.)).

Shumway also excavated a prehistoric breast plate made of tree bark in that same vicinity. (Id. at 163-168). When Dr. Coulam later went to the Dop-Ki Cave site to access the archaeological damage, the only portion of the infant's skeleton that remained was the skull on top of the dirt pile. (TT, 8/2/95 at 54-55).

Ruhl returned later in the day to pick up Shumway and Miller. Shumway again directed Ruhl to fly in an attempt to locate Shumway's first intended site. Frustrated and unable to find the site a second time, Shumway directed Ruhl to fly to the Manti-Lasal National Forest and to land at the Horse Rock Ruin site (Counts III and IV). (TT, 8/1/95 at 174). By Shumway's statements about this site, and his detailed knowledge as to how to get to the site and of the specific landmarks in the area, Shumway showed intimate familiarity with this particular archaeological site. During the flights, Shumway made numerous statements referring to the topography and the sites, particularly in reference to the Manti-LaSal site. Shumway's statements and actions prior to and during the flights clearly indicated to Miller that Shumway was very familiar with archaeological sites in the area, and had been at the Manti-LaSal site numerous times. In addition, once on the ground at the Horse Rock Ruin site on the Manti-LaSal Forest, Shumway pointed out to Miller where within the ruins it would be most productive to dig in order to find baskets and other prehistoric artifacts. (Id. at 170-177). Shumway found a pair of sandals and a sleeping mat during the dig at this site. (Id. at 178-188).

Admission of Rule 404(b) Evidence

Prior to trial, Shumway moved the court to preclude the government from introducing evidence of other crimes committed by Shumway. (Doc. 17, No. 95-CR-97W). The government's Notice of Intent to Introduce Rule 404(b) Evidence was limited to evidence of Shumway's illegal activities in April, 1984 at Horse Rock Ruin, aka Cliffdweller's Pasture or Jack's Pasture (the Manti-LaSal site of the offenses charged in Counts III and IV).⁶ (Doc. 20, No. 95-CR-97W).

The district court held a pretrial hearing to determine the admissibility of the Rule 404(b) evidence. The government argued that the evidence was admissible for the purposes of establishing identity, knowledge and intent. (Doc. 66 (94-CR-185W); TT, 7/31/95 at 82). Shumway's counsel informed the court that the sole defense at trial would be that Shumway was not the person who committed the offenses. (Tr. of Motion Hearing, 7/26/95 at 5-6, 10). Based upon this representation, the court initially ruled that the following evidence was admissible at trial for the limited purpose of establishing identity: (1) certified transcript of the change of plea proceedings on January 17, 1986, before the Honorable J. Thomas Greene, in United States v. Shumway, No. CR-84-149, redacted to include only Shumway's sworn colloquy with the court concerning his guilty plea to Count

⁶Shumway is on record and under oath stating that he has been "digging artifacts from public land" since "the time I was five years old" and has done so in the San Juan County area "thousands of times." (Doc. 66, 94-CR-185W).

I⁷; (2) testimony of Craig Endicott, Special Agent, U.S. Forest Service, relating Shumway's statements concerning his experiences and conduct at Horse Rock Ruin, aka. Jacks' Pasture (name used by Shumway) in April 1984, and his subsequent conduct relating to selling and attempting to sell the artifacts (approximately 34 prehistoric baskets) which he and others excavated and removed from the site (Shumway made these statements to Agent Endicott in the Spring of 1986 following his plea of guilty in No. CR-84-149); (3) videotape of Shumway in the Spring of 1986 examining and discussing several artifacts which he had illegally removed from Horse Rock Ruin in April of 1984 (redacted to excise all portions other than those specifically relating to Horse Rock Ruin artifacts); (4) various photographs of baskets and other artifacts illegally removed by Shumway from Horse Rock Ruin in April 1984); (5) certified transcript of sworn testimony of Shumway in United States v. Allen Buddy Black, No. CR-86-97 (D. Ut.), jury trial proceedings on September 18, 1986 (redacted to include only portions of Shumway's testimony). (Tr. 7/26/95 at 22-29).

During trial, and at the government's request, the district court reconsidered its previous ruling concerning the 404(b) evidence. The court determined that in the absence of a stipulation by Shumway that identity was the only issue in the

⁷In No. CR-84-149 (D. Ut.), Shumway was charged in Count I with a felony ARPA violation relating to his conduct at the same archaeological site (Horse Rock Ruin, Manti-Lasal National Forest) named in Counts III and IV in the instant matter.

case, the evidence would also be admitted to show knowledge and intent. (TT, 7/31/95 at 82-85; Doc. 31, Jury Instruction #10 in 95-CR-97W).⁸

At trial, the Rule 404(b) evidence was introduced through Special Agent Endicott. (TT, 7/31/195 at 58-78; 8/1/95 at 14-33). The district court gave limiting instructions to the jury concerning this evidence. (TT, 7/31/95 at 56-57; Doc. 31 in 95-CR-97W, Instruction #10).

Sentencing - December 15, 1995

A consolidated sentencing hearing was conducted on December 15, 1995 in No. 94-CR-185W and No. 95-CR-97W. Prior to sentencing, Shumway filed written objections to the Probation Officer's recommendation that he be given two-level adjustments for obstruction of justice and vulnerable/susceptible victim. Shumway further objected to the Probation Officer's calculation of "loss" associated with the six felonies involving damage to archaeological resources. (Doc. 79, No. 94-CR-185W; Doc. 37, No. 95-CR-97W). At the sentencing hearing, Shumway made oral objections to the vulnerable/susceptible victim adjustment, the obstruction of justice enhancement, calculation of loss, and the adequacy of the reasons supporting an upward departure in criminal history. (Tr. 12/15/95 at 17-18; 20-28, 59-61).

⁸Motion to Supplement Record on Appeal (to include Jury Instructions) filed contemporaneously with this Answer Brief. Jury Instruction #10 is attached as A.

Prior to sentencing, the government moved for upward departure in the offense level as well as the criminal history category. (Docs. 81 and 82, No. 94-CR-185W; Docs. 39 and 40, No. 95-CR-97W). Shumway objected, arguing that to grant a departure in the offense level would constitute permissible double counting inasmuch as the court had already given Shumway a two-level adjustment for vulnerable/susceptible victim and had already included archaeological value in the calculation of loss. (Tr.12/15/95 at 50-52). The court agreed and rejected the government's request for an upward departure in the offense level. (Id. at 44-45, 54).

At sentencing, the court made the following findings with respect to each of these areas:

a. Vulnerable/Susceptible Victim Adjustment:

Mr. Furner concluded that human remains disturbed in one of the counts in each of the two cases qualified for the vulnerable victim adjustment. And there's no question in this case particularly on the evidence that I heard that 97W that this terrible, and I don't want to get emotional or sound like that has anything to do with it, but this deceased Native American that had been buried in that area hundreds of years ago was just dug up and desecrated in the most horrible way, which is, of course, the grossest kind of a front to our Native American citizens which is referred to on Page 38, Paragraph 11 of Mr. Furner's report, a statement from Mr. Willie Numkena who is the executive director of the Utah Division of Indian Affairs.

Id. at 22-23.

Judge Greene in United States v. Brooks, 93-CR-51G, applied this in a case where the defendants disturbed and removed human remains. And I think that although this is certainly arguable to say the least, I think that the victim related adjustment should apply in this case.

Id. at 23.

Well, I'm going to [adopt the probation officer's calculation] on this particular vulnerable victim, and I find there's a two-point enhancement on that and that it covers this case.

(Id. at 30).

b. Obstruction of Justice Adjustment:

I think the --- unfortunately for Mr. Shumway the most obvious violation of that guideline that he's committed is that he committed perjury. When he was before me on September 21, 1995, and changed his plea on 185 [No. 94-CR-185W], he testified before me under oath that no one else was involved in the digging of the alcoves. And his codefendant in that case, Mr. Verchick, he was specifically asked about him and he testified under oath that Mr. Verchick did not assist in any way in digging within any of the alcoves.

When Mr. Verchick appeared before me on November 2nd, 1995, and entered his plea of guilty, he testified that he and Carrie Shumway, the defendant's wife, and the defendant all dug in the alcoves. And a statement that Ms. Shumway, Miss Carrie Shumway gave to the Bureau of Land Management said essentially the same thing.

I mean, it's inconceivable to me that Mr. Verchick would come in and tell me something more damning to himself that occurred and he admitted before me in entering his plea that he did. The defendant's wife acknowledged that in an unsworn statement. And I just have little doubt that guideline has been violated by him not testifying truthfully under oath.

Id. at 16-17.

I find that there's been obstruction of justice. And consequently, we're dealing with a two-point enhancement.

Id. at 19.

c. Calculation of Loss:

[T]he correct application note is 2B1.1, note 2, and that defines loss. And it says, and I quote:

Loss means the value of property taken that is damaged or destroyed. Ordinarily when

property is taken or destroyed, loss is the fair market value of particular property [sic] at issue. Where market value, and I think this is the critical part, is difficult to certain or inadequate to measure harm to the victim, the Court may measure loss in some other way such as the reasonable replacement cost to the victim.

In this case, there were two archaeologists, both of them experts, that testified at the trial of 97W, and both of those testified to the loss that would exceed \$120,000. Very importantly as far as I'm concerned, the specific code sections in 43 CFR 7.14 determined and set forth the manner in which the loss is calculated. And these archaeologists got on the witness stand and testified that in their expert opinion the damages and the harm to the United States and the replacement cost to the United States in trying to re-create these ruins that had been destroyed or damaged was that figure.

Id. at 19-20.

I think the loss is the \$138,000-plus, and I so find.

Id at 22.

d. Upward Departure in Criminal History:

I don't think that the criminal history category of III adequately reflects the seriousness of defendant's past criminal conduct. And I also think there's a strong likelihood that he will commit other crimes. I don't take at complete face value his statement about he's committed the crime thousands of times, but I've already said what I think in that regard. I think that frankly the man has made a way of life out of pot hunting down there on government lands and apparently thought or may still think that he has the right to do this.

I've reviewed all of the relevant information, and what I'm going to do is increase the criminal history points by three which moves his criminal history points from four to seven and places him in criminal history category Roman IV. That result would apply if he just had one prior conviction for a felony would raise it to seven if it was within the appropriate time period. And I think that's really rather lenient, if anything, in increasing his criminal history category from III to IV and given all of the relevant information that I've

tried to look at before I made this decision under 4A1.3.

Id. at 62.

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion in admitting evidence pursuant to Rule 404(b), Fed.R.Evid. for the purpose of showing identity since the prior act involved the same criminal activity and occurred at exactly the same location as the present offense. The evidence was also admissible for purposes of establishing Shumway's knowledge of archaeological matters and of this site in particular, and to prove knowledge and intent which are essential elements of the charged offenses.

The district court did not err in adjusting Shumway's sentence under U.S.S.G. § 3A1.1 by two levels because Shumway knew or should have known the remains of the deceased infant desecrated by Shumway at Dop-Ki Cave were unusually vulnerable/susceptible because of age [of the remains], the spiritual and religious importance associated with the remains by the Native American community, and the manner of burial of these remains.

The district court accurately determined loss in this ARPA case by aggregating the archaeological value of the resources and the cost of restoration and repair.

The two level enhancement for obstruction of justice was proper because Shumway perjured himself by making material statements to a judge which "would tend to influence or affect the issue under determination." U.S.S.G. § 3C1.1.

The court's decision to depart upward in criminal history from category III to category IV was proper because of Shumway's numerous prior incidences of similar criminal conduct as established by the evidence at trial and in the Presentence Report, and Shumway's lack of remorse and the likelihood of recidivism.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF APPELLANT'S PRIOR CRIMINAL CONDUCT UNDER RULE 404(b), FED.R.EVID.

a. Standard of Review: A district court's decision to admit "other crimes" evidence pursuant to Rule 404(b), Fed.R.Evid., is reviewed for abuse of discretion. United States v. Lopez-Gutierrez, 83 F.3d 1235, 1240 (10th Cir. 1996). Abuse of discretion "is not merely an error of law or judgment, but an overriding of the law by the exercise of manifestly unreasonable judgment or the result of impartiality, prejudice, bias or ill-will as shown by evidence or the record of proceedings." United States v. Wright, 826 F.2d 938, 943 (10th Cir. 1987).

b. Discussion: Rule 404(b), Fed.R.Evid., allows the trial court to admit "evidence of other crimes, wrongs, or acts . . . as proof of . . . intent . . . knowledge (and) identity . . ." It is well settled that the rule is one of inclusion which admits evidence of other crimes relevant to an issue in a trial, unless the evidence is introduced for an impermissible purpose or undue prejudice is shown." United States v. Cuch, 842 F.2d 1173, 1176 (10th Cir. 1988) (and cases cited therein).

In order to determine the admissibility of 404(b) evidence, this Court applies a four-pronged test: (1) the evidence must be offered for a proper purpose; (2) the evidence must be relevant; (3) the trial court must determine under Rule 403 that the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice; and (4) the trial court must give the jury a proper limiting instruction upon request. See United States v. Hill, 60 F.3d 672, 676 (10th Cir.), cert. denied, 116 S. Ct. 432 (1995) (citing Huddleston v. United States, 485 U.S. 681, 691-92 (1988)).

The government was offering the 404(b) evidence for two purposes. (Doc. 66 (94-CR-185W); TT, 7/26/95 at 82). First, the evidence tended to establish identity by showing Shumway's familiarity with archaeological matters in general as well as the particular archaeological site (Horse Rock Ruin) at issue in Counts III and IV in 95-CR-97W. This evidence was highly probative in that it showed Shumway was the perpetrator of these crimes, that is, the person who directed the helicopter to Horse Rock Ruin and demonstrated considerable knowledge about this particular archaeological site. Second, the evidence established elements of the charged offenses: "knowingly" as to Count I and III; "wilfully" as to Counts II and IV.

Shumway argued that the 404(b) evidence should not be admitted for any purpose, since the only issue in this case was whether he was the person who flew in the helicopter with Ruhl and Miller and looted artifacts at the Dop-Ki Cave and Horse Rock

Ruin sites. Shumway also argued that the proffered 404(b) evidence was insufficient to be admitted to prove the element of identity. (Tr. 7/26/95 at 5-6, 10). The court admitted the evidence for the limited purpose of establishing identity. (Tr. 7/26/95 at 22-29).

During trial the court reconsidered its previous ruling that the 404(b) evidence was admissible only for the purpose of establishing identity. The court then ruled that since knowledge and intent were required elements in this case, and Shumway had not stipulated that the only contested issue was identity, the 404(b) evidence was admissible to show knowledge and intent as well as identity. (TT, 7/31/95 at 82-85; Doc. 31, Jury Instruction #10 in 95-CR-97W).

"Other crimes" evidence tending to establish identity of the perpetrator, as well as a defendant's familiarity with a particular area, has been upheld on appeal. In United States v. Porter, 881 F.2d 878 (10th Cir.), cert. denied, 493 U.S. 944 (1989), the government sought to introduce evidence of the attempted burglary of a grocery store to identify defendant as the perpetrator of two bank burglaries. In upholding the admission of the 404(b) evidence for this purpose, this Court relied in part on the similarity of location of the three crimes.

Likewise, in United States v. Stubbins, 877 F.2d 42 (11th Cir.), cert. denied, 493 U.S. 940 (1989), the court admitted evidence of a prior sale of crack cocaine for the purpose of

establishing identity, stressing the importance of the common location of the two crimes:

In this case, the distinctive feature of both offenses was that they occurred at the same address. As the district judge stated in his ruling on the evidence question, 'both offenses were involved with or originated in or were a part of the use of the same premises and...that factor is sufficiently unusual and distinctive as to constitute a modus operandi...'

Id. at 44 (emphasis added).

In United States v. Torres-Flores, 827 F.2d 1031 (5th Cir. 1987), evidence that defendant had been previously arrested in the same area where the charged assault occurred was admissible because it tended to prove he was the assailant. The evidence "established that the defendant frequented the area...(and) bore on the probability of his presence there at the time of the assault." Id. at 1035. See also United States v. Burkett, 821 F.2d 1306, 1309 (8th Cir. 1987) (evidence of prior burglaries relevant to show intent, especially where one of the entries involved the same post office burglarized in the charged offense).

Shumway's digging and looting at Horse Rock Ruin in 1984 and again in 1991 met the 404(b) requirements due to the uniqueness of the site itself. Dr. Coulam testified that there are approximately 22,000 documented archaeological sites located within San Juan County, Utah. (TT 7/31/95 at 40). In both cases, Shumway went to the exact same archaeological site to excavate and loot. Prior to and during the helicopter flight, the perpetrator made numerous statements about his experience in

digging at archaeological sites and recovering artifacts, especially baskets, and making a great deal of money. When Miller began digging at Horse Rock Ruin, the perpetrator stated that this was a good place to dig and look for baskets. The 404(b) evidence proved Shumway looted 34 prehistoric baskets from Horse Rock Ruin in 1984 and sold most of them for tremendous profit. This evidence was extremely probative on the issue of identity.

The evidence was also admissible to show Shumway's knowledge of archaeological matters and of the particular Manti-LaSal Forest site. See United States v. Deninno, 29 F.3d 572, 577 (10th Cir. 1994) (evidence that defendant had been present at other methamphetamine "cooks" several months prior to the charged offense admissible under Rule 404(b) because it "was relevant as to (defendant's) knowledge and ability to manufacture methamphetamine"), cert. denied 115 S. Ct. 1117 (1995).

Moreover, the 404(b) evidence was "clearly relevant" to establish essential elements of the offenses (i.e. knowledge and intent). See United States v. Hill, 60 F.3d 672, 676 (10th Cir.), cert. denied, 116 S. Ct. 432 (1995).⁹ A violation of ARPA (16 U.S.C. § 470ee) is a general intent crime; it must be proven that the defendant "knowingly" committed the prohibited act. Damage to government property under 18 U.S.C. § 1361 is a

⁹"By standing on his not guilty plea, Hill put[] in issue every material ingredient of the crime charged, leaving the government its full burden of proving every element beyond a reasonable doubt." Hill, 60 F.3d at 676.

specific intent crime; the defendant must act "willfully." See United States v. Jones, 607 F.2d 269, 273 (9th Cir. 1979), cert. denied, 444 U.S. 1085 (1980). Under § 1361, the statutory element of willfulness is satisfied when the defendant acts intentionally, with knowledge that he is violating the law. See United States v. Simpson, 460 F.2d 515, 518 (9th Cir. 1972); United States v. Moylan, 417 F.2d 1002, 1004 (4th Cir. 1969), cert. denied, 397 U.S. 910 (1970).

As to the third prong of Huddleston, the court conducted the necessary balancing under Rule 403, finding the probative value of the evidence outweighed the prejudicial effects of each piece of proffered 404(b) evidence. (Tr. 7/26/95 at 22-29).

This Court recognizes that Rule 404(b) evidence is not sufficiently probative if it is too remote in time. See United States v. Patterson, 20 F.3d 801, 813 (10th Cir.), cert. denied, 115 S. Ct. 128 (1994) (citing United States v. Record, 873 F.2d 1363, 1375 (10th Cir. 1989)). The seven year time span between the 1984 and the 1991 crimes did not substantially diminish the probative value of this evidence. "[T]here is no absolute rule regarding the number of years that can separate offenses. Rather, the court applies a reasonableness standard and examines the facts and circumstances of each case." United States v. Franklin, 704 F.2d 1183, 1188 (10th Cir.), cert. denied 464 U.S. 845 (1983). The record shows that the district court carefully considered the seven year "passage of time" (Tr. 7/26/95 at 8)

and nevertheless found the evidence to be probative on the issue of identity.

This Court and other circuit courts have admitted evidence where similar time gaps existed. See United States v. Cuch, 842 F.2d 1173, 1177-78 (10th Cir. 1988) (seven and one half year time span between assaults not too remote); United States v. McCollum, 732 F.2d 1419 (9th Cir.), cert. denied, 469 U.S. 920 (1984) (admission of 12 year old prior conviction under Rule 609 held harmless error as evidence would have been admissible under Rule 404(b); United States v. Engleman, 648 F.2d 473, 479 (8th Cir. 1981) (no abuse of discretion admitting evidence of 13 year old prior offense); United States v. Dudley, 562 F.2d 965 (5th Cir. 1977) (prior offense admissible under 404(b) as it occurred within six years of charged offense).

Prior to the admission of the 404(b) evidence, the court gave a limiting instruction to the jury which reflected the court's preliminary ruling that the evidence was admissible for the limited and sole purpose of proving identity. (TT, 7/31/95 at 56-57). After the court reconsidered its ruling on the 404(b) evidence during trial, the court gave a limiting instruction cautioning the jury to consider the evidence only for "proof of intent, knowledge and identity." (Jury Instruction #10 attached as Attachment A).

Shumway contends the 404(b) evidence was unduly prejudicial because without it the government's evidence on identity would have been insufficient (Appellant's Opening Brief in No. 95-4201

at 13). Shumway is incorrect and misconstrues the testimony at trial. Michael Miller, a participant in the charged offenses, identified Shumway in court, stating he was "100 percent" sure that Shumway was the perpetrator. (TT, 8/1/95 at 109, 208-09). Renae Stewart, owner of the lounge and pool hall where Miller and Shumway met, and her sister Margaret Berger, employee at the lounge, both identified Shumway in court as a customer in the same lounge frequented by Miller. (*Id.* at 54, 63). Ms. Berger stated that Shumway talked about taking a trip to Moab to look at old ruins. (TT, 8/1/95 at 63-64). Frank Michael Brown, who worked construction with Shumway in 1992, said Shumway told him that he had flown with Miller and John Ruhl for the purpose of looking for caves and ruins. (TT, 8/2/95 at 4-6). Shumway's brother in law, Michael Burton, testified he informed Agent Fitzgerald that Shumway had told him that Shumway "talked the helicopter service into flying him around looking for movie sites, and what he was really doing was looking for ruins." (*Id.* at 15-16).

II. THE DISTRICT COURT WAS NOT CLEARLY ERRONEOUS IN IMPOSING A VULNERABLE/SUSCEPTIBLE VICTIM ADJUSTMENT (U.S.S.G. § 3A1.1(b)) BASED ON APPELLANT'S DESECRATION OF PREHISTORIC NATIVE AMERICAN HUMAN REMAINS.

a. Standard of Review: A district court's findings regarding a victim's vulnerability/susceptibility under U.S.S.G. § 3A1.1 is a question of fact subject to a clearly erroneous standard of review. United States v. Brunson, 54 F.3d 673, 676 (10th Cir.), cert. denied, 116 U.S. 397 (1995).

b. Discussion: U.S.S.G. § 3A1.1(b) provides:

If the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible to the criminal conduct, increase by 2 levels. [emphasis added].-

“‘Vulnerable victims’ are those in need of greater societal protection.” United States v. Brunson, 54 F.3d 673, 676 (10th Cir.), cert. denied, 116 S. Ct. 397 (1995). In making its individualized findings concerning the vulnerable/susceptible victim in this case, the district court relied on the evidence at trial and the presentence report.

The trial evidence established that Shumway, through his own admissions, is a life-long archaeological resource offender. Shumway is on record stating that he had committed archaeological crimes “thousands of times.” (Tr. 12/15/95 at 55). Shumway knew or should have known, based upon his extensive criminal history concerning archaeological resources, that the remains of the deceased prehistoric Native American infant were unusually vulnerable due to age [of the remains], manner of burial, and importance of the burial to the Native American community. Alternatively, for these same reasons, Shumway knew or should have known that such remains were “otherwise particularly susceptible” to his criminal conduct.¹⁰

¹⁰The Sentencing Commission’s decision to include in § 3A1.1 the alternative provision (“or that a victim was otherwise particularly susceptible”) was purposeful and must be given separate consideration. See United States v. Peters, 962 F.2d 1410, 1416 (9th Cir. 1992); see also Bailey v. United States, 116 S. Ct. 501, 507 (1995) (“We assume that Congress used two terms

"Unlike the factors specified for vulnerability, this (susceptibility) language does not limit the reasons for finding a victim vulnerable." United States v. Borst, 62 F.3d 43, 46 (2d Cir. 1995); see also United States v. Peters, 962 F.2d-1410, 1417 (9th Cir. 1992) and United States v. Lallemand, 989 F.2d 936, 938-39 (9th Cir. 1993). In assessing whether a victim is "particularly susceptible", the court must consider the totality of the circumstances. Borst, 62 F.3d at 46.

Miller first discovered the unprotected remains of the deceased infant while he and Shumway were digging at Dop-Ki Cave. The remains were located in a shallow gravesite without protection of a tomb, marker, coffin or vault. The only security surrounding the aged remains of the infant was a burial blanket. Shumway explained to Miller they had located a burial site and insisted on taking over the digging. Shumway then "peeled the blanket off the skeleton" and said "we should keep digging because they normally bury them stacked side by side." Shumway tossed the bones of the infant aside and left them uncovered. (TT, 8/1/95 at 163-168). Later, Dr. Coulam visited Dop-Ki Cave to access the archaeological damage at the site and found only the skull cap of the infant lying on top of the dirt. (TT, 8/2/95 at 54-55).

["use and carry"] because it intended each term to have a particular, nonsuperfluous meaning").

The court also relied upon the presentence report in determining the applicability of the vulnerable/susceptible victim adjustment:

In U.S. v. Brooks, (Ricky Edward & Wilma D.) District of Utah Case No. 93-CR-00051-G, the defendants disturbed and removed human remains. The Court found that the adjustment for vulnerable victim was applicable and therefore applied. The instant offense likewise involves the destruction of two prehistoric graves and disturbance of Native American human remains. Clearly, the deceased is an individual and vulnerable, due to age and being deceased. The deceased descendants, past, present, and future, are victims, made vulnerable by how their ancestors were buried. To Native Americans, an undisturbed grave is essential to the spiritual well-being of their deceased. No adjustment has been made to the presentence report.

(Addendum to PSR at 4).

The presentence report also contained this statement by Dr. Coulam regarding Dop-Ki Cave:

Oral histories of Puebloan peoples, including the Hopi, Acoma, and Laguna, tell of their ancestral occupation of the Canyonlands area. Among the Hopi, nine clans all migrated through and inhabited the area. For these people, Dop-ki Cave is not just an archeological site, it is their ancestral home. The shrines and sacred areas that were blessed and actively visited by their ancestors are considered sacred to this day by members of these clans...Dop-ki Cave is particularly important to these peoples because it contained the grave of an infant. While the cultural affiliation of this infant cannot be absolutely determined...this infant was unquestionable Anasazi, directly related to the Puebloan peoples of Arizona and New Mexico.

(PSR at 12, para. 39).

In making its findings, the district court specifically referred to a statement made by Mr. Wil Numkena, Executive Director of the Utah Division of Indian Affairs, contained in the presentence report:

Burials have high spiritual and sacred significance to American Indian tribes across the United States. This is deeply rooted in the holistic beliefs and spiritual philosophies of the tribes...Burial of the deceased are especially provided sacred ceremonies for their journey into the next dimension of life; to be with the creator and the family.

American Indian burials are sacred as the deceased, grave, and funerary objects are blessed, consecrated, and dedicated to the care and keeping of the creator. The burial site becomes "Holy Ground," never to be disturbed.

Disturbance of Indian burials is an extremely sensitive issue with American Indian people. Let it be understood that American Indian people have "never" surrendered the spirits and remains of their ancestors

There can be no distinction placed on past, present, and future Indian burials for convenience of discovery, research and exploitation. Every Indian burial is sacred. Therefore, remains and funerary objects must be reinterred to their rightful place with honor and respect.

Federal and States statutes have to be executed with compelling consequences for the wanton disturbance, possession, and trafficking of Indian remains and funerary objects.

(PSR and 11-12, para.38).

Based upon the trial evidence and the presentence report upon which the court relied, its findings that the remains of this deceased infant Native American were "unusually vulnerable" or "particularly susceptible to the criminal conduct" were not clearly erroneous.

Shumway first contends that application of the § 3A1.1 adjustment to a deceased individual is erroneous. Shumway cites no authority nor does § 3A1.1 suggest any such restriction. In United States v. Roberson, 872 F.2d 597 (5th Cir.), cert. denied, 493 U.S. 861 (1989), the district court adjusted defendant's

sentence two levels for victim vulnerability. After the Roberson victim was killed by defendant, his corpse was driven around Texas for several days and then dumped into a garbage container where the defendant set the body on fire and burned it beyond recognition. The Fifth Circuit upheld the two-level adjustment:

[A]lthough Doherty did not experience physical pain or monetary loss as a result of Roberson's actions, he certainly suffered indignity in having his corpse abused and his good name brought into this whole sordid affair.

Id. at 609.

By analogy, the Ninth Circuit has upheld the application of § 5K2.8 in a voluntary manslaughter case where the "extreme conduct" was inflicted on the victim after death. United States v. Quintero, 21 F.3d 885, 893-895 (9th Cir. 1994) (but remanded for resentencing because degree of departure not adequately explained).

Shumway also argues that the vulnerable/susceptible victim adjustment is inapplicable because he did not target the remains of Native Americans. The targeting of a victim, for purposes of § 3A1.1, is no longer required. On November 1, 1995, (prior to Shumway's sentencing), § 3A1.1 was substantially amended. U.S.S.G. App. C, Amendment 521. The cases cited by Shumway to support the proposition that targeting is required preceded Amendment 521 and are inapplicable.

The purpose of Amendment 521 was to "clarif[y] the operation of § 3A1.1 with respect to a vulnerable victim." Id. Prior to November, 1995, § 3A1.1, comment. (n. 1) provided in part: "This

adjustment applies to offenses where an unusually vulnerable victim is made a target of criminal activity by the defendant." In explaining the deletion of Application Note 1, the Sentencing Commission stated:

Although the Commission found that the current guidelines generally provided adequate penalties in these cases, it noted some inconsistency in the application of § 3A1.1 regarding whether this adjustment required proof that the defendant had "targeted the victim on account of the victim's vulnerability." This amendment revises the Commentary of § 3A1.1 to clarify application with respect to this issue.

Amendment 521, last paragraph.

Shumway claims that the adjustment is inappropriate because the remains of this particular deceased Native American do not "have individual characteristics beyond their class" as Native American human remains. (Appellant's Opening Brief, No. 96-4000, at 10). This argument misstates the issue. The class to which this victim belonged was deceased/buried human beings. Although the fact that someone is deceased and buried are common factors to all in this "class," whether Native American or European, born in prehistoric times or more recently, etc., it is the unusual and unprotected manner of burial, and associated religious and spiritual customs and beliefs, that make the remains of Native American prehistoric people "unusually vulnerable" or "otherwise particularly susceptible" to unlawful excavations of prehistoric archaeological sites, as compared to other deceased individuals.

Shumway also argues "that it was simply a matter of coincidence that the skeletal remains were unearthed"

(Appellant's Opening Brief, No. 95-4201, at 17) and "the disturbance of these remains was incidental to the offense."

(Appellant's Opening Brief, No. 96-4000, at 8). On the contrary, Shumway's extensive knowledge of Anasazi culture and artifacts, developed during his life-long digging and looting of prehistoric ruins and sites in San Juan County, made him well aware that encountering human remains under these circumstances was not only a distinct possibility but also increased the likelihood of finding funerary objects and artifacts in association with the human remains (e.g., a prehistoric burial blanket).

Furthermore, the evidence of Shumway's conduct immediately following Miller's discovery of the infant's remains certainly belies his claim of "coincidence" and that they were unearthed "incidental to the offense." Instead of leaving the human remains undisturbed and informing Miller to do likewise, Shumway immediately took over the excavation, looted the burial blanket for future sale, and left the infant's remains uncovered on the ground. Shumway's reprehensible treatment of this particular Native American infant was neither "coincidental" nor "incidental to the offense."¹¹

¹¹As noted in the Statement of Facts (Sentencing), the court denied the government's request to make an upward departure in base offense level under § 2B1.3, comment (n. 4) on the basis of Shumway's extreme conduct, and the failure of the guidelines to specifically consider ARPA violations. In so doing, the court reasoned that to depart upward would be repetitive inasmuch as Shumway's base offense level had already been adjusted for vulnerable victim, and the archaeological value had already been factored into the loss calculation.

This § 3A1.1 adjustment issue must be viewed in its proper context. There being no specific guideline for a violation of the Archaeological Resources Protection Act of 1979, and consequently no "specific offense characteristics" pertaining to such violation, the district court was correct (and certainly not clearly erroneous) in applying a § 3A1.1 adjustment where (1) Shumway, a repeat ARPA violator, "knew or should have known" of the likelihood of disturbing (victimizing) unprotected Native American human remains by his criminal conduct, and (2) such disturbance actually occurred.¹²

III. THE DISTRICT COURT WAS NOT CLEARLY ERRONEOUS IN INCLUDING THE VALUE OF THE ARCHAEOLOGICAL RESOURCES DAMAGED BY APPELLANT IN CALCULATING THE AMOUNT OF "LOSS" (U.S.S.G. § 2B1.1) RELATING TO HIS OFFENSES.

a. Standard of Review: Factual findings supporting a district court's loss calculation are reviewed under the clearly erroneous standard; questions of law regarding application of the sentencing guidelines are reviewed de novo. United States v. Sapp, 53 F.3d 1100, 1104 (10th Cir. 1995), cert. denied, 116 S. Ct. 796 (1996). The question of what factors the guidelines direct the court to consider in computing the amount of loss is a legal question and review is de novo. United States v. Lara, 956 F.2d 994, 998 (10th Cir. 1992).

¹²If there was a particular sentencing guideline for ARPA offenses, it undoubtedly would provide "specific offense characteristics" for disturbance of human remains during the ARPA offense and looting of funerary objects associated with the remains. Cf. 18 U.S.C. § 1170 (a portion of the Native American Graves Protection and Repatriation Act of 1990, prohibiting trafficking in Native American human remains and cultural items).

b. Discussion: The court determined that § 2B1.3 was the "most analogous" guideline for ARPA. (PSR at 16; see also 2X5.1). However, this determination does not mean that this guideline is "adequate" for purposes of determining losses in ARPA cases. U.S.S.G. § 2B1.3, comment. (n. 4) provides:

In some cases, the monetary value of the property damaged or destroyed may not adequately reflect the extent of the harm caused....In such instances, an upward departure would be warranted. [emphasis added.]

Prior to sentencing, the government moved for an upward departure in Shumway's offense level pursuant to U.S.S.G. § 2B1.3, comment. (n. 4). (Docs. 81 and 82 in 94-CR-185W and Docs. 39 and 40 in 95-CR-97W; (Tr., 12/15/95 at 37-54). The court denied the motion, ruling that since archaeological value had already been factored into the loss analysis, an upward departure would be inappropriate. (Id. at 45, 54). Section 2B1.3 refers the court to § 2B1.1 for the calculation of loss. In determining that archaeological value was a vital component in determining loss in these ARPA cases, the district court first quoted §2B1.1, comment. (n. 2) in determining that the loss here was "difficult to ascertain or inadequate to measure harm to the victim." (Tr., 12/15/95 at 19-20).

Section 2B1.1, comment. (n. 3) is also instructive:

For the purposes of subsection (b)(1), the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information. This estimate, for example, may be based upon the approximate number of victims and the average loss to each victim, or on more general factors such as the scope and duration of the offense. [emphasis added].

"In construing the term loss", the court of appeals decides "whether the district court correctly computed the loss attributable to [the] Defendant's criminal activities." United States v. Johnson, 941 F.2d 1102, 1114 (10th Cir. 1991). This Court has explained the important nexus between the loss calculation and the nature of the crime:

Section...2B1.1 of the guidelines and the accompanying notes make clear that "loss" is not simply intended to be a measure of the net monetary damage to the victim. It's purpose is to gauge the severity of a particular offense.

United States v. Lara, 956 F.2d 994, 998 (10th Cir. 1992)

(emphasis added).

Moreover, 18 U.S.C. § 3553(a) directs the court to consider certain factors in imposing sentence, including "the need for the sentence imposed...to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense."

Pursuant to § 2B1.1 commentary, § 3553(a) and the applicable Tenth Circuit caselaw, the district court was correct in considering the scope, duration and severity of Shumway's six felony ARPA and § 1361 offenses in adequately determining loss. In doing so, it was reasonable for the court to use the applicable factors established by Congress in the ARPA statute (i.e., archaeological value and cost of restoration and repair) to determine loss attributable to Shumway's criminal activities, especially where no specific ARPA guideline exists and loss was difficult to ascertain.

16 U.S.C. § 470ee(d), which governs the statutory penalty for archaeological crimes, requires aggregating archaeological value and cost of restoration and repair to determine if the offense is a felony or a misdemeanor. Section 470ee(d) provides:

Any person who knowingly violates. . . this section shall, upon conviction, be . . . imprisoned not more than one year . . . 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 . . . imprisoned not more than two years . . . [emphasis added.]¹³

This Court's attention is invited to the Congressional findings underlying the ARPA legislation:

The Congress finds 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.

16 U.S.C. § 470aa(a) (emphasis added).

Congress also defined the purpose of the ARPA legislation in

16 U.S.C. § 470aa(b):

The purpose of this chapter is to secure, for the present and future benefit of the American people, the

¹³For a repeat offender of ARPA, such as Shumway, a second conviction is a felony, regardless of the aggregate sum, and carries a maximum penalty of five years imprisonment for each such conviction. 16 U.S.C. § 470ee(d).

protection of archaeological resources and sites which are on public lands and Indian lands....

When the district court calculated loss by considering both factors identified in 470ee(d), archaeological value and cost of restoration and repair, rather than just the latter as urged by Shumway, the court was interpreting and implementing the Sentencing Guidelines in conformity with the predicate ARPA legislation. By doing so, the court followed the lead of Congress in acknowledging the irreplaceable historical and cultural loss inflicted on the American public (present and future generations), by ARPA violators, as well as the profound sacred significance the loss of these resources has on the Native American community.

Shumway does not challenge the archaeological value calculations. He simply asserts that the court could not consider archaeological value in its computation of loss. Shumway first argues that the court did not find that market value was difficult to ascertain or was inadequate to measure harm under § 2B1.1, comment (n. 2), but merely found that the federal regulation (43 C.F.R. § 7.14(a) and (c)) aggregating archaeological value and cost of restoration and repair was a correct measure of loss. (Appellant's Opening Brief, No. 96-4000 at 13). By referencing Application Note 2 language about the loss being difficult to ascertain or the market value being inadequate to determine loss, it is implicit that the court found that the loss calculation in these cases must be made in "some other way." As argued above, the manner of loss calculation was

reasonable and appropriate inasmuch as there is no specific ARPA guideline, ARPA offenses are unique and their consequences irremediable. The seriousness of ARPA offenses is most adequately addressed by using the aggregate factors Congress set forth in § 470ee(d).

Shumway further contends that §2B1.1, comment. (n.2) directs the court to only consider cost of repairs when property is damaged. (Appellant's Opening Brief, No. 95-4201 at 18). By relying on § 470ee(d) and its implementing regulations (43 C.F.R. § 7.14(a) and (c)) to calculate loss, the district court acknowledged Congress' determination that cost of restoration and repair alone was insufficient to quantify the uniqueness and seriousness of ARPA offenses. To accept Shumway's analysis would require the Court to disregard Congressional intent in enacting ARPA, the lack of a specific sentencing guideline for ARPA offenses, and the particularly egregious nature of the criminal activity involved in ARPA offenses.

In conclusion, the district court properly included archaeological value when it calculated loss. The court considered the scope, duration and severity of Shumway's offenses as required by § 2B1.1, comment. (n. 2 and n. 3), 18 U.S.C. § 3553(a) and Tenth Circuit authority. Section 470ee(d), aggregating archaeological value and cost of restoration and repair for purposes of determining the applicable penalty provisions for a violation of ARPA, provides the most accurate and responsible way for the court to properly incorporate these

factors (i.e. scope, duration, and severity) in assessing the overall devastating and irremediable effects on our Nation's heritage, and the spiritual disturbance to the Native American community, resulting from archaeological resource violations.

IV. THE DISTRICT COURT WAS NOT CLEARLY ERRONEOUS IN IMPOSING AN OBSTRUCTION OF JUSTICE ADJUSTMENT (U.S.S.G. § 3C1.1) BASED ON APPELLANT'S PERJURY AND PROVIDING FALSE INFORMATION TO A JUDGE.

a. Standard of Review: The Court of Appeals reviews the district court's findings of perjury for clear error. United States v. Fitzherbert, 13 F.3d 340, 344 (10th Cir. 1993), cert. denied, 114 S. Ct. 1627 (1994). The Court of Appeals gives "due regard to the opportunity of the district court to judge the credibility of witnesses." United States v. Guadalupe, 979 F.2d 790, 795 (10th Cir. 1992) (internal quotes omitted).

b. Discussion: On September 21, 1995 in 94-CR-185W, Shumway entered a plea of guilty to a violation of ARPA, damaging government property, and felon in possession of a firearm (aiding and abetting was also alleged as to the first two charges).¹⁴ During the plea proceeding, the prosecutor questioned Shumway under oath for the purpose of supplementing the factual basis for his plea:

MR. DANCE: Did Peter Verchick go into any of those alcoves with you?

MR. SHUMWAY: No, not that I know of.

¹⁴Peter Verchick was charged as a co-defendant of Shumway in this case as to the ARPA and § 1361 offenses. As of 9/21/95, the charges were still pending against Verchick.

MR. DANCE: Did Peter Verchick assist you in any manner in the digging within any of those alcoves?

MR. SHUMWAY: No.

MR. DANCE: Did you assist Peter Verchick in any manner in the digging within any of those alcoves?

MR. SHUMWAY: No.

MR. DANCE. Did you see Peter Verchick in any of those alcoves in which you did dig or disturb the soil?

MR. SHUMWAY: No, I didn't see him.

(Tr. 9/21/95 at 21).

Peter Verchick appeared before the district court on November 2, 1995 and entered his guilty plea. (Tr. 11/2/95). Verchick was allowed to plead guilty to a misdemeanor information alleging one ARPA violation and aiding and abetting. In exchange for his plea of guilty, the government agreed to dismiss the indictment alleging felony ARPA and § 1361 violations (94-CR-185W).

At the time Verchick pled guilty, the court explained that he would be placed under oath and asked a number of questions in order to establish a factual basis for the plea. The court told Verchick that if he perjured himself when answering those questions, he could be subject to prosecution. (Tr. 11/2/95 at 4). The court made inquiry and Peter Verchick admitted his involvement in the charged offense. (Id. at 13-14).

The court then asked if the prosecutor wanted to supplement the questioning. The following colloquy between the prosecutor and Verchick further established the factual basis for the guilty

plea, which developed sworn testimony directly contrary to Shumway's at his change of plea hearing:

MR. DANCE: Mr. Verchick, did you go into at least two different alcoves in that area with Mr. Shumway?

MR. VERCHICK: Yes, I did.

MR. DANCE: And did you go to those alcoves knowing that he was going to be digging and disturbing the contents of those alcoves?

MR. VERCHICK: Yes, I did.

MR. DANCE: And did you assist him by carrying a shovel that he later used in digging those alcoves?

MR. VERCHICK: Yes, I did.

MR. DANCE: Were you present when he used a shovel to dig and excavate within those alcoves.

MR. VERCHICK: Yes, I was.

MR. DANCE: Did you see him do so.

MR. VERCHICK: Yes, I did.

MR. DANCE: Was there anyone else present besides you and Mr. Earl Shumway when he was doing that?

MR. VERCHICK: Yes, there was.

MR. DANCE: Who was that?

MR. VERCHICK: His wife, Carrie Shumway.

MR. DANCE: Did you see whether or not she engaged in any digging or disturbance of the soil and the contents of the alcoves?

MR. VERCHICK: Yes she did.

MR. DANCE: Did she use any equipment to do that?

MR. VERCHICK: A small trowel.

MR. DANCE: Was Mr. Earl Shumway present when Carrie Shumway was engaging in that activity?

MR. VERCHICK: Yes, he was.

MR. DANCE: Did he see what she was doing?

MR. VERCHICK: Yes, he did.

MR. DANCE: Did Mr. Earl Shumway give you any directions or advice as to how you should do what you were doing within the alcoves?

MR. VERCHICK: He made a comment that, you know, if I had a screen, it would work better to go through the dirt, that sort of thing.

(Tr. at 14-16).

At Shumway's sentencing the district court found it "inconceivable" that Peter Verchick would make these statements under oath which would subject him to prosecution for perjury if his answers were untrue. (Tr. 12/15/95 at 16-17).

In addition, Carrie Shumway, Shumway's wife said:

while she was digging, she saw Mr. Verchick poking around the main alcove with a shovel and observed him digging in the alcove with Earl. She said Earl did most of the digging, as they only had one shovel.

(PSR at 13-14).

An adjustment under U.S.S.G. § 3C1.1 is proper:

If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.

This adjustment applies to perjury (comment. (n. 3(b)) and to providing false information to a judge (comment. (n.3(f))). Perjury is defined as testimony given by a defendant concerning a material matter with the willful intent to provide false testimony rather than as a result of confusion, mistake or faulty memory. See United States v. Dunnigan, 507 U.S. 87, 94 (1993).

For purposes of § 3C1.1, a statement is material when, if believed, "would tend to influence or affect the issue under determination." § 3C1.1, comment. (n. 5).

The case relied upon by Shumway, United States v. Bernaugh, 969 F.2d 858 (10th Cir. 1992), supports the government's position that Shumway did obstruct justice by perjuring himself before the court at his guilty plea proceeding. In Bernaugh, the defendant entered a plea of guilty. The court questioned the defendant extensively about his codefendants in order to establish a factual basis for the plea. The defendant, in an attempt to protect his codefendants who were awaiting trial, made statements under oath which the court later determined to be "flatly contradicted by the evidence that I heard at trial." Id. at 861. This Court upheld the § 3C1.1 adjustment:

The Guidelines contemplate that an "offense" may include the concerted criminal activity of multiple participants. See U.S.S.G. CH. 3, Pt. B, Intro. comment. Consequently, the section 3C1.1 enhancement applies where a defendant attempts to obstruct justice in a case closely related to his own, such as that of a codefendant...

Before entering a judgment upon Bernaugh's guilty plea, the district court was required to make factual inquiry as shall satisfy it that there is a factual basis for the plea, Fed.R.Crim.P. 11(f), a task which appropriately led the district court to inquire into Bernaugh's role in the crime in relation to that of his codefendants.

Id. at 861-62.

Here, as in Bernaugh, Shumway perjured himself before the court when questioned about his involvement with codefendant Verchick. The testimony was material for purposes of § 3C1.1

because it could have misled the court as to the criminal conduct of Verchick. Verchick had not yet entered his plea of guilty at the time Shumway gave the perjured testimony. The testimony was also material as to the aiding and abetting charges against both Shumway and Verchick. The court's determination that Shumway obstructed justice was not clearly erroneous.

IV. THE DISTRICT COURT PROPERLY DEPARTED UPWARD ONE CRIMINAL HISTORY CATEGORY (U.S.S.G. § 4A1.3) AFTER DETERMINING THAT APPELLANT HAD COMMITTED SIMILAR CRIMES "AT LEAST 100 OTHER TIMES."

a. Standard of Review: In reviewing a district court's decision to depart upward from the Guidelines, the Court of Appeals applies a three-step analysis.

First, the Court determines de novo whether the circumstances cited by the district court justify a departure. Second, factual findings are reviewed under the clearly erroneous standard. Third, if the departure is justified, the Court reviews the degree of departure to determine if it is reasonable.

United States v. Warner, 43 F.3d 1335, 1337 (10th Cir. 1994)

b. Discussion: Chapter Four, Part A, of the Sentencing Guidelines pertains to the sentencing court considering the "criminal history" of the defendant. The "introductory commentary" to Part A provides:

...General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence. To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered. Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation... (emphasis added).

U.S.S.G. § 4A1.3, entitled "Adequacy of Criminal History Category," provides:

If reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes, the court may consider imposing a sentence departing from the otherwise applicable guideline range. Such information may include, but is not limited to, information concerning:

...(e) Prior similar adult criminal conduct not resulting in a criminal conviction.

A departure under this provision is warranted when the criminal history category significantly underrepresents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit further crimes... The court may, after a review of all the relevant information, conclude that the defendant's criminal history was significantly more serious than that of most defendants in the same criminal history category, and therefore consider an upward departure from the guidelines... (emphasis added).

At sentencing, the district court departed upward in criminal history from a Category III to a Category IV.¹⁵

This Court has held that the similarity of a defendant's present conduct to recurrent past reprehensible behavior is an appropriate departure criterium under § 4A1.3. United States v. Jackson, 903 F.2d 1313, 1320 (10th Cir.), rev'd on other grounds, 921 F.2d 985 (10th Cir. 1990) (en banc). The court explained that departure on this ground is justified because the similarity of the defendant's criminal conduct may indicate the seriousness of the past crimes as well as the likelihood of future crimes:

¹⁵The government requested an upward departure in criminal history to Category VI.

The recidivist's relapse into the same criminal behavior demonstrates his lack of recognition of the gravity of his original wrong, entails greater culpability for the offense with which he is currently charged, and suggests an increased likelihood that the offense will be repeated...

903 F.2d at 1320 (quoting United States v. DeLuna-Trujillo, 868 F.2d 122, 125 (5th Cir. 1989)).

This Court has also indicated that in deciding whether to depart upward, a district court may properly consider the need to protect society from a particular defendant. See, United States v. Kalady, 941 F.2d 1090, 1099 (10th Cir. 1991); see also, 18 U.S.C. § 3553(a)(2)(C).

The district court properly concluded that the sentencing guidelines calculation of Shumway's criminal history at category III was clearly inadequate. Under the guidelines, Shumway receives only one criminal history point for his felony conviction in 1986 (the infamous "basket case") for an egregious ARPA violation. Shumway receives no points for the staggering number of his other ARPA and related violations ("thousands" according to Shumway's own sworn statement) in which he damaged and destroyed, looted and plundered the priceless and irreplaceable archaeological and cultural treasures of this nation.

Shumway claims that the court's findings are inadequate since there is no indication what "relevant information" the court relied upon in arriving at its decision to depart upwards. This is a specious argument. The record fully supports the district court's decision that the criminal history category

computed under the guidelines "does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes." U.S.S.G. § 4A1.3. "A district court has considerable discretion in appraising a defendant's criminal history. The Court may consider the defendant's present or past criminal conduct as grounds for departure to a higher criminal history category." United States v. Jackson, 921 F.2d 985; 991 (10th Cir. 1990) (en banc) (emphasis added).

The government requested an upward departure in Shumway's criminal history based upon:

1. The evidence seen and heard by the court and the jury during the trial in Case No. 95-CR-97W, concerning the untold number of prior violations of a similar nature committed by Shumway ("thousands of times" by his own account; PSR at 21, para 75; Tr. 12/15/95 at 55); and

2. The information set forth in the Presentence Report detailing Shumway's criminal history, lack of true remorse, and likelihood of recidivism (in particular, the "other criminal conduct" section of PSR at 21-23, para. 75-78).

Although the court hesitated to fully accept Shumway's boastful admissions that he had committed archaeological violations "thousands of times", it did find that the evidence established Shumway had done so at "at least 100 times":

I don't have any doubt that on countless occasions Mr. Shumway has been out in the United States government lands digging over the last, I don't know how long. But I would stake everything I have on the fact that at

least 100 other times he's been digging out there other than the two that he's been convicted of....

(Tr. 12/15/95 at 60) (emphasis added).

I don't take at complete face value his statement about he's committed the crime thousands of times, but I've already said what I think in that regard. I think frankly the man has made a way of life out of pot hunting down there on government lands and apparently thought or may still think that he has the right to do this.

(Id. at 62) (emphasis added).

The relevant evidence contained in the presentence report at pages 21-23, paragraphs 75 through 78, upon which the court also relied in departing upwards in Shumway's criminal history, contains many of Shumway's own admissions stating he had been digging artifacts since "around the time I was five years old" and that he engaged in such conduct "thousands of times." (PSR at 21, para. 75); the chances are "a million to one" that an experienced looter will avoid getting caught (id. at para. 76); "the first grave I ever dug was when I was three years old, and I've dug ever since" (id. at para. 77(2)); and "I'm not gonna bring my kid into a world you can't go out and dig up an old ruin." (Id. at para. 77(5)).

Shumway also argues that the court may have relied on his prior convictions already factored into the guideline calculation in departing upward in criminal history. The court specifically noted that it believed the relevant evidence showed Shumway dug at least 100 times "other than the two times he's been convicted of." (Id. at 60). There is also nothing in the record

suggesting the court relied on information already taken into consideration in calculating Shumway's sentence.

Shumway also challenges the court's findings regarding the degree of reasonableness of the departure. Acknowledging that Shumway dug at least "100 times", the court viewed this entire past criminal conduct as if he had suffered only one other prior felony conviction for all of it, and three additional criminal history points were assigned for this hypothetical conviction. The court explained that the addition of these three points would make the criminal history points total seven and thus put Shumway in criminal history category IV rather than a category III. (Tr. 12/15/95 at 63). This Court approves of the use of "analogies to offense characteristic levels, criminal history categories, and other principles in the guidelines to determine the appropriate degree of departure." United States v. Roth, 934 F.2d 248, 252 (10th Cir. 1991); see also United States v. Yates, 22 F.3d 981, 989-990 (10th Cir. 1994).

When viewed against the backdrop of Shumway's life-long series of crimes of this nature, the analogy made by the district court (one "felony conviction" representing all of his uncharged past criminal conduct) was reasonable and appropriate in determining the degree of departure. Based on the Shumway's "way of life" criminal history, the devastating effect it has had on this nation's archaeological and cultural heritage, as well as the trauma it has inflicted on the Native American community, the court's upward departure to category IV was warranted.

CONCLUSION

Based upon the foregoing, Shumway's judgments of conviction and sentence should be affirmed.

ORAL ARGUMENT STATEMENT

The government believes that oral argument would be of material assistance to this Court due to the novel nature of some of the issues.

RESPECTFULLY SUBMITTED this 7TH day of August, 1996.

SCOTT M. MATHESON, JR.
United States Attorney



WAYNE T. DANCE
Assistant United States Attorney

ATTACHMENT A

001010

INSTRUCTION NO. 10

During the course of the trial, the court has allowed the introduction of evidence of the defendant's conduct similar to the acts and offenses charged in the Indictment, but which occurred on another occasion. As you have been previously instructed, and are now again instructed, such evidence is not to be considered by you as evidence of the defendant's character, or any character trait of the defendant, or that he acted in conformity therewith regarding the charges in the Indictment. In other words, you may not convict the defendant simply because you believe he may have committed some acts, even bad acts, in the past.

However, you may consider such evidence for the limited purpose of proof of intent, knowledge and identity -- that is, whether the defendant committed the alleged crimes with the requisite intent, and whether the similarity between the acts previously committed and the ones charged in the Indictment tends to prove that the same person committed all of them.

UNITED STATES of America, Plaintiff-Appellee,
v.
Earl K. SHUMWAY, Defendant-Appellant.

Nos. 95-4201, 96-4000. [FN*]

FN* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed.R.App.P. 34(a); 10th Cir.R. 34.1.9. The case is therefore ordered submitted without oral argument.

United States Court of Appeals,
Tenth Circuit.

May 6, 1997.

Defendant pleaded guilty in the United States District Court for the District of Utah, David K. Winder, J., to violation of Archaeological Resources Protection Act, damaging United States property, and being a felon in possession of a firearm. Defendant was also convicted in a separate case of violations of Archaeological Resources Protection Act and damaging United States property in connection with a separate incident. Defendant appealed, and appeals were consolidated. The Court of Appeals, Brorby, Circuit Judge, held that: (1) prior acts evidence was admissible; (2) prehistoric human skeletal remains from archaeological site did not constitute a "vulnerable victim," for purposes of Sentencing Guidelines; (3) district court's calculation of loss under Sentencing Guidelines was proper; (4) obstruction of justice Sentencing Guideline applied; and (5) upward departure from Sentencing Guidelines was not an abuse of discretion.

Affirmed in part, and reversed and remanded in part.

[1] CRIMINAL LAW k1153(1)
110k1153(1)

Court of Appeals reviews district court's admission of other crimes evidence for abuse of discretion. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[2] CRIMINAL LAW k1147
110k1147

An abuse of discretion occurs when a judicial determination is arbitrary, capricious or whimsical.

[3] CRIMINAL LAW k1147
110k1147

Court of Appeals will not overturn a discretionary judgment by trial court where it falls within bounds of permissible choice in the circumstances.

[4] CRIMINAL LAW k369.2(1)
110k369.2(1)

In determining admissibility of other crimes evidence, court applies a four- part test, which requires the following: 1) evidence was offered for a proper purpose; 2) evidence was relevant; 3) trial court properly determined the probative value of evidence was not substantially outweighed by its potential for unfair prejudice; and 4) trial court gave jury proper limiting instructions upon request. Fed.Rules Evid.Rules 403, 404(b), 28 U.S.C.A.

[4] CRIMINAL LAW k673(5)
110k673(5)

In determining admissibility of other crimes evidence, court applies a four- part test, which requires the following: 1) evidence was offered for a proper purpose; 2) evidence was relevant; 3) trial court properly determined the probative value of evidence was not substantially outweighed by its potential for unfair prejudice; and 4) trial court gave jury proper

limiting instructions upon request. Fed.Rules Evid.Rules 403, 404(b), 28 U.S.C.A.

[5] CRIMINAL LAW k369.15

110k369.15

Location and specialized skill, the two features shared by prior and charged acts of unauthorized excavation of archeological sites, were sufficient to constitute a "signature quality" such that commission of prior act was relevant to show identity as to current charged act; remoteness of location, difficulty of access, and varying concentration of artifacts, all suggested person who committed prior act and charged acts was one possessing distinctive, unique and unusual skills necessary to locate and excavate artifacts. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[6] CRIMINAL LAW k372(1)

110k372(1)

Elements relevant to determination of whether prior acts evidence, which is not identical to crime charged, has a signature quality required for admission of prior acts evidence include geographic location, unusual quality of the crime, and skill necessary to commit the acts. Fed.Rules Evid.Rules 403, 404(b), 28 U.S.C.A.

[7] CRIMINAL LAW k372(1)

110k372(1)

A few highly unique factors involved in prior act may constitute a "signature," warranting admission of prior acts evidence in current prosecution, while a number of lesser unique factors, although insufficient to generate a strong inference of identity if considered separately, may be of significant probative value when considered together. Fed.Rules Evid.Rules 403, 404(b), 28 U.S.C.A.

[8] CRIMINAL LAW k369.2(1)

110k369.2(1)

There is no absolute rule regarding number of years that can separate prior acts and current offense, for purposes of determining admissibility of prior acts evidence; rather, court applies a reasonableness standard and examines facts and circumstances of each case. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[9] CRIMINAL LAW k369.15

110k369.15

District court did not abuse its discretion in reaching conclusion that evidence that defendant had previously excavated artifacts from same site was probative and admissible as to identity with respect to current offense of unlawful excavation of artifacts, despite fact that prior incident occurred seven years ago. Fed.Rules Evid.Rules 403, 404(b), 28 U.S.C.A.

[10] CRIMINAL LAW k371(1)

110k371(1)

Prior acts evidence that defendant unlawfully excavated artifacts from same site seven years ago was relevant and admissible to show defendant's intent to commit instant offense of damaging United States property. 18 U.S.C.A. § 1361; Fed.Rules Evid.Rules 403, 404(b), 28 U.S.C.A.

[11] CRIMINAL LAW k370

110k370

Prior acts evidence that defendant unlawfully excavated artifacts from same site seven years ago was relevant and admissible in prosecution for violation of Archaeological Resources Protection Act to show defendant knew objects he was excavating were archaeological resources. Archaeological Resources Protection Act of 1979, § 6(a), 16 U.S.C.A. § 470ee(a); Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[12] CRIMINAL LAW k338(7)

110k338(7)

District court did not abuse its discretion in finding that probative value of prior acts evidence that seven years previously defendant had excavated artifacts from same archeological site was not substantially outweighed by its prejudicial effect in prosecution for damaging United States property and violation of Archaeological Resources Protection Act; defendant made no more than conclusory statements that admission of the evidence was prejudicial to his defense. Archaeological Resources Protection Act of 1979, § 6(a), 16 U.S.C.A. § 470ee(a); 18 U.S.C.A. § 1361; Fed.Rules Evid.Rules 403,

404(b), 28 U.S.C.A.

[13] CRIMINAL LAW k338(7)
110k338(7)

Trial court is vested with broad discretion in determining whether evidence's probative value is substantially outweighed by its potential to cause prejudice. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

[14] CRIMINAL LAW k369.2(1)
110k369.2(1)

Evidence of prior bad acts will always be prejudicial, and it is trial court's job to evaluate whether guaranteed risk of prejudice outweighs legitimate contribution of the evidence. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

[15] CRIMINAL LAW k1153(1)
110k1153(1)

Court of Appeals is required to give substantial deference to trial court's rulings as to whether probative value of evidence is outweighed by its prejudicial value. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

[16] CRIMINAL LAW k1254
110k1254

Prehistoric human skeletal remains from archaeological site did not constitute a "vulnerable victim," for purposes of Sentencing Guideline permitting two point increase in base offense level if defendant knew or should have known that victim was unusually vulnerable. U.S.S.G. § 3A1.1(b), 18 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

[17] CRIMINAL LAW k1158(1)
110k1158(1)

Normally, district court's determination of a "vulnerable victim," for purposes of Sentencing Guideline permitting two point increase in base offense level if defendant knew or should have known that victim was unusually vulnerable, is a question of fact reviewable for clear error. U.S.S.G. § 3A1.1(b), 18 U.S.C.A.

[18] CRIMINAL LAW k1254
110k1254

For purposes of Sentencing Guideline permitting two point increase in base offense level if defendant knew or should have known that victim was unusually vulnerable, "vulnerable victim" is someone who is unable to protect himself or herself from criminal conduct and is therefore in need of greater societal protection than the average citizen. U.S.S.G. § 3A1.1(b), 18 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

[19] CRIMINAL LAW k1139
110k1139

While Court of Appeals reviews district court's factual findings for clear error, Court reviews de novo questions of what factors district court may consider in assessing loss under Sentencing Guidelines. U.S.S.G. § 2B1.3, 18 U.S.C.A.

[20] HEALTH AND ENVIRONMENT k43
199k43

Asserted cost of archaeological artifact's fair market value and cost of restoration and repair, amounting to \$9,122, failed to reflect adequately extent of damage defendant inflicted on archaeological site; thus, district court could calculate loss, for purposes of loss Sentencing Guideline, by basing its calculation of a loss of over \$120,000 on testimony of archaeologists as to archaeological value, cost of restoration and repair, and damage to archaeological sites, and on archaeological damage assessment report for two additional sites in counts to which defendant pleaded guilty. U.S.S.G. §§ 2B1.1(b)(1)(J), 2B1.3(b)(1), 18 U.S.C.A.

[21] LARCENY k88
234k88

For purposes of determining appropriate offense level under Sentencing Guidelines, "loss" is not simply intended to be

001014

a measure of net monetary damage; loss also serves to gauge severity of particular offense. U.S.S.G. §§ 2B1.1, 2B1.3, 18 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

[22] CRIMINAL LAW k1139

110k1139

Court of Appeals reviews district court's factual findings on enhancement of offense level under Sentencing Guidelines for clear error and its legal conclusions de novo. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

[22] CRIMINAL LAW k1158(1)

110k1158(1)

Court of Appeals reviews district court's factual findings on enhancement of offense level under Sentencing Guidelines for clear error and its legal conclusions de novo. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

[23] CRIMINAL LAW k1253

110k1253

Defendant commits "perjury," for purposes of obstruction of justice Sentencing Guideline, if he or she gives false testimony concerning a material matter with willful intent to provide false testimony. U.S.S.G. § 3C1.1, 18 U.S.C.A. See publication Words and Phrases for other judicial constructions and definitions.

[24] CRIMINAL LAW k1253

110k1253

Defendant's making false statements bearing on criminal liability of codefendant warranted enhancement of his offense level for obstruction of justice. U.S.S.G. § 3C1.1, 18 U.S.C.A.

[25] CRIMINAL LAW k1147

110k1147

Court of Appeals reviews district court's decision to depart from Sentencing Guidelines for abuse of discretion. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

[26] CRIMINAL LAW k1263

110k1263

Before departure from Sentencing Guidelines is permitted, certain aspects of case must be found unusual enough for it to fall outside the heartland of cases in the Guideline. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

[27] CRIMINAL LAW k1134(3)

110k1134(3)

Once Court of Appeals determines whether district court has abused its discretion in departing from Sentencing Guidelines, Court reviews departure for reasonableness. 18 U.S.C.A. § 3742(e)(3); U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

[28] CRIMINAL LAW k1287(11)

110k1287(11)

District court did not abuse its discretion in departing upward under Sentencing Guidelines in sentencing defendant for unlawfully excavating archaeological sites; defendant stated under oath he had been digging artifacts from public lands since a young age and had looted archaeological sites "thousands of times." U.S.S.G. § 4A1.3(e), 18 U.S.C.A.

[29] CRIMINAL LAW k1263

110k1263

An "encouraged factor" for departing from Sentencing Guidelines is one Sentencing Commission has not been able to take into account fully in formulating Guidelines. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

[30] CRIMINAL LAW k1260

110k1260

001015

In assessing whether degree of departure from Sentencing Guidelines was reasonable, Court of Appeals considers district court's reasons for imposing particular sentence together with factors such as seriousness of offense, need for just punishment, deterrence, protection of public, correctional treatment, sentencing pattern of Guidelines, policy statements contained in Guidelines, and need to avoid unwarranted sentencing disparities. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

[31] CRIMINAL LAW k1260

110k1260

District court may use any reasonable methodology hitched to Sentencing Guidelines to justify reasonableness of departure, including using extrapolation from or analogy to the Guidelines. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

*1417 Wayne T. Dance, Assistant United States Attorney (Scott M. Matheson, United States Attorney, with him on the briefs), Salt Lake City, Utah, for Plaintiff-Appellee.

G. Fred Metos (Joseph C. Fratto, Jr. with him on the briefs), Salt Lake City, Utah, for Defendant-Appellant.

Before SEYMOUR, BRORBY and KELLY, Circuit Judges.

BRORBY, Circuit Judge.

Appellant, Mr. Earl K. Shumway, appeals his conviction and sentence entered in the United States District Court for the District of Utah. We affirm in part, reverse in part, and remand for resentencing.

I. BACKGROUND

On November 16, 1994, Mr. Shumway was charged in a three-count indictment alleging: 1) violation of the Archaeological Resources Protection Act, 16 U.S.C. § 470ee(a) and 18 U.S.C. § 2; 2) a related charge of damaging United States property under 18 U.S.C. § 1361 and 18 U.S.C. § 2; and 3) felon in possession of a firearm under 18 U.S.C. § 922(g). Mr. Shumway pleaded guilty to all three felony counts.

On June 1, 1995, Mr. Shumway was charged in a four-count indictment. Counts one and three alleged violations of the Archaeological Resources Protection Act, 16 U.S.C. § 470ee and 18 U.S.C. § 2. Counts two and four alleged related charges of damaging United States property pursuant to 18 U.S.C. § 1361 and 18 U.S.C. § 2. After a trial, a jury convicted Mr. Shumway of all charges.

In a consolidated sentencing, the district court sentenced Mr. Shumway to seventy-eight months in prison, a three-year term of supervised release, restitution in the amount of \$5,510.28, and a \$350 special assessment. Mr. Shumway now appeals both his sentence and his jury conviction.

II. FACTS

Mr. Shumway's jury conviction stemmed from his unauthorized excavation of two Anasazi [FN2] archeological sites: Dop-Ki Cave and Horse Rock Ruin. Dop-Ki Cave is located on federal lands in Canyonlands National Park, and Horse Rock Ruin, also known as Cliffdwellers' Pasture or Jack's Pasture, is located on federal lands near Allen Canyon, Manti-LaSal National Forest.

FN2. Anasazi is the name assigned by archaeologists to a prehistoric culture living in the Four Corners area of Utah, Arizona, Colorado, and New Mexico during the Formative Period from 300 A.D. to 1300 A.D.

At trial, the government introduced evidence to show Mr. Shumway met a helicopter mechanic, Michael Miller, at a lounge and pool hall in Utah and developed a social relationship with him. The two eventually began discussing Mr. Shumway's experience in finding archeological artifacts and his experience in making large amounts of money selling those artifacts. Mr. Shumway asked Mr. Miller if he could find a helicopter to fly them around to find archeological artifacts.

Enticed by the prospects of money and Mr. Shumway's apparent knowledge of the subject, Mr. Miller contacted his friend, John Ruhl, a helicopter pilot. Mr. Miller told Mr. Ruhl of the plan to find and sell artifacts and asked Mr. Ruhl

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to pilot the helicopter to fly Mr. Miller and Mr. Shumway around to look for artifacts. Mr. Ruhl agreed. Mr. Shumway then posed as a movie scout and called Mr. Ruhl's supervisor at the helicopter company claiming he needed the helicopter to look for movie sites. Mr. Shumway arranged to have Mr. Ruhl fly to Moab, Utah, to pick up Mr. Shumway and Mr. Miller.

Once airborne, Mr. Shumway directed Mr. Ruhl to fly to a particular archaeological site southeast of Moab, but Mr. Shumway had trouble locating the site. Unable to find the particular location, the group eventually landed at Dop-Ki Cave in Canyonlands National Park. Mr. Shumway and Mr. Miller began digging in the area. While digging in the cave, Mr. Miller discovered the human remains of an infant wrapped in a burial blanket. Mr. Shumway explained to Mr. Miller he had found a burial site. Mr. Shumway then took over the digging. Mr. Shumway fully excavated the infant remains and *1418 removed the burial blanket leaving the infant remains on the ground. When the damage to the site was later assessed, the only portion of the infant's skeleton remaining was the skull on top of the dirt pile.

The group then attempted, a second time, to find Mr. Shumway's first intended site. Unable to locate it, Mr. Shumway directed Mr. Ruhl to land at Horse Rock Ruin. Mr. Miller testified that based on the directions Mr. Shumway had given, and based on his detailed knowledge of the site, it seemed Mr. Shumway had been to the Horse Rock Ruin site before. The next morning, after spending the night at the site, Mr. Shumway found sandals and a sleeping mat during the dig at the site.

In 1986, Mr. Shumway testified in court regarding his conduct at Horse Rock Ruin in 1984, the same site referred to in counts three and four of the 1995 indictment. The government attempted to admit evidence of Mr. Shumway's prior illegal activities at Horse Rock Ruin to establish identity, knowledge and intent, pursuant to Fed.R.Evid. 404(b). Mr. Shumway filed a motion in limine to preclude the government from introducing Rule 404(b) evidence. After the hearing, the district court deemed admissible the evidence relating to Mr. Shumway's 1984 activities in the Horse Rock Ruin.

Specifically, the district court admitted the following evidence: 1) a certified transcript of Mr. Shumway's sworn colloquy with the court in the 1986 case, redacted to include only admissions concerning his 1984 conduct at Horse Rock Ruin; 2) a redacted portion of a videotape of Mr. Shumway examining several artifacts he stated he excavated and removed from Horse Rock Ruin in 1984; 3) the 1986 testimony of United States Forest Service Special Agent Craig Endicott summarizing Mr. Shumway's statements about removing and selling artifacts from the Horse Rock Ruin site in 1984; 4) several photographs of artifacts Mr. Shumway removed from Horse Rock Ruin in 1984; and 5) a certified transcript of Mr. Shumway's sworn testimony in United States v. Black, No. CR 67-97 (D.Utah), a case related to the illegal sale of artifacts taken from the Horse Rock Ruin site in 1984. During the motion in limine hearing, Mr. Shumway's counsel informed the court his defense at trial would be that Mr. Shumway was not the person who committed the offenses. The district court therefore deemed this evidence admissible, yet limited the evidence's admissibility to the purpose of establishing Mr. Shumway's identity.

During trial, the government requested the district court to reconsider and broaden its previous ruling to allow the 404(b) evidence to prove knowledge and intent in addition to identity. The court determined that absent a stipulation by Mr. Shumway that identity was the only issue involved, the 404(b) evidence also would be admitted to prove knowledge and intent. Accordingly, the court instructed the jury as to the limited purpose of the 404(b) evidence to establish intent, knowledge and identity.

After the jury convicted Mr. Shumway on all four counts, the district court consolidated for purposes of sentencing the 1994 case that resulted in Mr. Shumway's guilty plea. At sentencing, the court enhanced Mr. Shumway's base offense level as follows: two points for the vulnerable victim adjustment, pursuant to United States Sentencing Guidelines Manual § 3A1.1(b) (1995) (hereinafter USSG); two points for obstruction of justice, pursuant to USSG § 3C1.1; and nine points for calculating the loss at \$138,000 or more, pursuant to USSG § 2B1.1. Relying on USSG § 4A1.3, the court also departed upward from the Guidelines by increasing Mr. Shumway's criminal history category from III to IV. After the adjustments, Mr. Shumway's total offense level was twenty-two and his criminal history level IV, which resulted in a sentencing range of 63 to 78 months. The district court sentenced Mr. Shumway to seventy-eight months incarceration.

On consolidated appeal we consider five issues: 1) whether the district court erred in admitting evidence of Mr. Shumway's prior acts at Horse Rock Ruin pursuant to Fed.R.Evid. 404(b); 2) whether the district court erred in enhancing Mr. Shumway's offense level by imposing a vulnerable victim adjustment pursuant to USSG § 3A1.1(b); 3)

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whether the district court erred in enhancing the offense level for obstruction of justice *1419 pursuant to USSG § 3C1.1; 4) whether the district court erred in calculating the loss sustained under USSG § 2B1.1; and 5) whether the district court erred in departing upward from the Guidelines by increasing Mr. Shumway's criminal history category from III to IV under USSG § 4A1.3.

III. 404(b) Evidence

Mr. Shumway argues the district court erred in admitting the evidence regarding his 1984 acts in Horse Rock Ruin for purposes of identity, knowledge and intent. Specifically, Mr. Shumway argues the 1984 evidence lacked the "signature quality" necessary to show identity and was highly prejudicial to Mr. Shumway.

[1][2][3] We review the district court's admission of evidence under Fed.R.Evid. 404(b) for an abuse of discretion. *United States v. Wilson*, 107 F.3d 774, 782 (10th Cir.1997). "An abuse of discretion occurs when a judicial determination is arbitrary, capricious or whimsical." *United States v. Wright*, 826 F.2d 938, 943 (10th Cir.1987). We will not overturn a discretionary judgment by the trial court where it falls within the " 'bounds of permissible choice in the circumstances.' " *United States v. Dorough*, 84 F.3d 1309, 1311 (10th Cir.) (quoting *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir.1994)), cert. denied, --- U.S. ---, 117 S.Ct. 446, 136 L.Ed.2d 342 (1996).

[4] Under Fed.R.Evid. 404(b):

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident....

In determining whether the admission of 404(b) evidence was proper, we apply a four-part test, which requires the following: 1) the evidence was offered for a proper purpose; 2) the evidence was relevant; 3) the trial court properly determined under Fed.R.Evid. 403 the probative value of the similar-acts evidence was not substantially outweighed by its potential for unfair prejudice; and 4) the trial court gave the jury proper limiting instructions upon request. *Huddleston v. United States*, 485 U.S. 681, 691-92, 108 S.Ct. 1496, 1502, 99 L.Ed.2d 771 (1988); *United States v. Hill*, 60 F.3d 672, 676 (10th Cir.), cert. denied, --- U.S. ---, 116 S.Ct. 432, 133 L.Ed.2d 347 (1995). [FN3] Because all four parts of the Huddleston test are satisfied, we conclude the district court did not abuse its discretion in admitting evidence of Mr. Shumway's prior illegal acts at Horse Rock Ruin.

FN3. To the extent Mr. Shumway argues this court's decision in *United States v. Harrison*, 942 F.2d 751, 759-60 (10th Cir.1991) is inconsistent with Huddleston's four-part test, we disagree and reject the argument.

A. Proper Purpose and Relevance

First, the government offered, and the district court admitted, the evidence of Mr. Shumway's prior activities at Horse Rock Ruin for proper purposes under Fed.R.Evid. 404(b): identity, knowledge, and intent. Second, the evidence was relevant as to each of these factors.

1. Relevance--Identity

[5] As stated, at a pretrial hearing on Mr. Shumway's motion in limine to exclude the evidence, Mr. Shumway's counsel stated his main defense would be that Mr. Shumway was not the person involved. After the hearing, the district court determined it would allow the prior evidence only to show identity. The court held, and we agree, the evidence of Mr. Shumway's 1984 prior activities at Horse Rock Ruin, the exact same site as that specified in two counts of the 1995 indictment, made more likely the inference the same person looted the same site on both occasions.

Mr. Shumway argues, however, the prior act evidence was not relevant under 404(b) because the prior act lacked the "signature quality" necessary to show identity. Specifically, Mr. Shumway argues the 1984 act was not sufficiently similar to the acts at issue in the present case to be probative of identity because the methods used to excavate the sites were not sufficiently similar. Additionally, *1420 Mr. Shumway argues the prior act is not probative of identity because it preceded the acts at issue in the trial by seven years. We disagree.

We have held that to prove identity, evidence of prior illegal acts need not be identical to the crime charged, so long as,

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based on a "totality of the comparison," the acts share enough elements to constitute a "signature quality." *United States v. Patterson*, 20 F.3d 809, 813 (10th Cir.), cert. denied, 513 U.S. 841, 115 S.Ct. 128, 130 L.Ed.2d 72 (1994); *United States v. Ingraham*, 832 F.2d 229, 233 (1st Cir.1987); *United States v. Gutierrez*, 696 F.2d 753, 754 (10th Cir.1982), cert. denied, 461 U.S. 909, 103 S.Ct. 1884, 76 L.Ed.2d 813 and 461 U.S. 910, 103 S.Ct. 1885, 76 L.Ed.2d 814 (1983).

[6] Elements relevant to a "signature quality" determination include the following: geographic location, *United States v. Porter*, 881 F.2d 878, 887 (10th Cir.1989) (fact that all crimes took place in small rural Kansas communities relevant to "signature quality" determination); *United States v. Stubbins*, 877 F.2d 42, 44 (11th Cir.1989) (that both offenses occurred at the same premises was probative of identity); the unusual quality of the crime, *Patterson*, 20 F.3d at 813 (fact that hijacking is an unusual crime was a relevant factor in "signature quality" determination); the skill necessary to commit the acts, *United States v. Barrett*, 539 F.2d 244, 248 (1st Cir.1976) (ability to bypass burglar alarm a "distinctive feature" of crime); *United States v. Garcia*, 880 F.2d 1277, 1278 (11th Cir.1989) (defendant's skill in forging documents relevant to show identity); or use of a distinctive device, *United States v. Trenkler*, 61 F.3d 45, 55 (1st Cir.1995) (defendant's prior use of distinctive remote-control car bombs relevant in determining whether same person built both bombs); *United States v. Andrini*, 685 F.2d 1094, 1097 (9th Cir.1982) (defendant's description of distinctive incendiary device used in crime "sufficiently distinctive to show identity.").

[7] These enumerated elements relevant to a "signature quality" determination are not inclusive. Furthermore, the weight to be given to any one element and the number of elements necessary to constitute a "signature" are highly dependent on the elements' uniqueness in the context of a particular case. In other words, a few highly unique factors may constitute a "signature," while a number of lesser unique factors "although insufficient to generate a strong inference of identity if considered separately, may be of significant probative value when considered together." *United States v. Myers*, 550 F.2d 1036, 1045 (5th Cir.1977).

It is by this reasoning we are guided in making our "signature quality" determination. Here, the evidence of Mr. Shumway's prior activities at Horse Rock Ruin and the activities charged at trial share at least two distinctive features such that they demonstrate a "signature quality": the unique geographical location, and the skill and specialized knowledge necessary to commit both acts. See *United States v. Stubbins*, 877 F.2d 42 (11th Cir.), cert. denied, 493 U.S. 940, 110 S.Ct. 340, 107 L.Ed.2d 328 (1989); *United States v. Barrett*, 539 F.2d 244, 248 (1st Cir.1976).

First, Mr. Shumway visited Horse Rock Ruin to loot its contents once before. In *Stubbins*, the defendant was tried for conspiracy and distribution of crack cocaine. His main defense at trial was mistaken identity. 877 F.2d at 43. The prosecution attempted to admit evidence of a prior similar drug sale that took place at the same address as the location of the offense at issue during trial. *Id.* The court held the prior acts evidence was admissible and relevant to show identity under Fed.R.Evid. 404(b). *Id.* at 44. Specifically, the court held one distinctive feature of both offenses was that they occurred at the same address, a factor "sufficiently unusual and distinctive" as to be probative of identity. *Id.* at 44. The same is true here. An expert testified during Mr. Shumway's trial there are approximately 22,000 documented archaeological sites located within San Juan County, Utah, alone; however, Mr. Shumway chose the exact same site once before to search for artifacts. Consequently, while the methods employed at the Horse Rock Ruin site may not have been identical, given the context of this case, both acts share as a distinctive element the exact same location.

*1421 Also, Mr. Shumway's prior activities and the acts charged share a second distinctive feature: the skill and specialized knowledge necessary to commit both acts. *Barrett*, 539 F.2d at 248. In *Barrett*, the defendant was charged with crimes arising from the theft of a collection of postage stamps from a museum. *Id.* at 245. During the investigation it was discovered the burglars had bypassed the alarm system using sophisticated methods requiring skill and specialized knowledge. *Id.* at 246, 248. The circuit court affirmed the district court's decision to allow testimony portraying the defendant as one knowledgeable in the workings of burglar alarms. *Id.* at 247-49. In so holding, the court explained because the knowledge and expertise necessary to commit the crime was "so distinctive a feature" of the crime, evidence of the defendant's knowledge was relevant to establish identity. *Id.* at 248.

We find *Barrett*'s reasoning persuasive here. The existence of 22,000 sites in San Juan County alone, the remoteness of the location, the difficulty of access, and the varying concentration of artifacts, all suggest the person who committed both the prior act and the charged acts was one possessing distinctive, unique and unusual skills necessary to locate and excavate the artifacts. Extensive testimony was introduced showing that Mr. Shumway's statements and actions demonstrated substantial specialized knowledge and prior visits to the site. Mr. Miller testified Mr. Shumway had

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detailed knowledge as to how to get to the site and had a high degree of familiarity with the Horse Rock Ruin site. Particularly, Mr. Miller testified Mr. Shumway knew precisely where at the Horse Rock Ruin site to find artifacts. The prior acts evidence Mr. Shumway had looted the Horse Rock Ruin site once before therefore is probative to show he was one with specialized skill and knowledge sufficient to commit the acts charged. The fact Mr. Shumway not only looted before, but looted the Horse Rock Ruin once before, shows he had knowledge of the site's location and means of access, as well as the artifacts to be found there.

Therefore, we hold the two features shared by the prior and charged acts-- location and skill--are sufficient under the circumstances of this case to constitute a "signature quality" such that commission of the prior act was relevant to show identity.

[8][9] Mr. Shumway also argues because the first occurrence at Horse Rock Ruin was seven years prior to the second, it was not probative of identity. However, " [t]here is no absolute rule regarding the number of years that can separate offenses. Rather, the court applies a reasonableness standard and examines the facts and circumstances of each case.' " *United States v. Franklin*, 704 F.2d 1183, 1189 (10th Cir.) (quoting *United States v. Engleman*, 648 F.2d 473, 479 (8th Cir.1981)), cert. denied, 464 U.S. 845, 104 S.Ct. 146, 78 L.Ed.2d 137 (1983). Here, the district court considered the seven-year time span when deciding whether the evidence was probative; Mr. Shumway fails to convince us the district court abused its discretion in reaching its conclusion the evidence was probative as to identity.

2. Relevance--Intent and Knowledge

[10] As stated, the district court initially allowed the prior acts evidence only to show identity. However, during trial, the court reconsidered its decision and admitted the evidence also to show knowledge and intent. The district court held since knowledge and intent were required elements, and since Mr. Shumway had not stipulated that the only contested issue was identity, the 404(b) evidence was admissible to show knowledge and intent as well as identity. We agree.

The 404(b) evidence was relevant to show intent. Mr. Shumway was charged with violating 18 U.S.C. § 1361, which requires the government prove the accused acted "willfully." Therefore, Mr. Shumway's intent was an essential element of the crime charged. By standing on his not guilty plea, and by failing to give enforceable pretrial assurances he did not intend to dispute criminal intent, the government may " include such extrinsic offense evidence as would be admissible if intent were actively contested.' " *Franklin*, 704 F.2d at 1188 (quoting *United States v. Webb*, 625 F.2d 709, 710 (5th Cir.1980)). See also *Hill*, 60 F.3d at 676. Prior acts evidence is "clearly" relevant to show an essential *1422 element of the charged offense. *Hill*, 60 F.3d at 676. Therefore, the 404(b) evidence was relevant to show the essential intent elements of 18 U.S.C. § 1361.

[11] The 404(b) evidence was also relevant to show "knowledge" as to the charged violation of 16 U.S.C. § 470ee(a). Under § 470ee(a), no person may excavate, remove, etc. any archaeological resource located on public lands. 16 U.S.C. 470ee(a) (1994). Here, the 404(b) evidence tended to show Mr. Shumway knew the objects he was excavating were archaeological resources. See *Hill*, 60 F.3d at 676 (evidence of prior cocaine possessions admissible to show the defendant knew the substance he possessed was cocaine). Consequently, we hold the prior acts evidence was relevant to show identity, knowledge and intent as well as identity.

B. Probative Value Versus Prejudice

[12][13][14][15] Mr. Shumway argues admission of the 404(b) evidence was highly prejudicial under Fed.R.Evid. 403 and therefore the district court erred in admitting the 404(b) evidence under Huddleston's second prong. However, the district court explicitly found the probative value of the 404(b) evidence was not substantially outweighed by its potential for prejudice. The trial court is vested with broad discretion in determining whether evidence's probative value is substantially outweighed by its potential to cause prejudice. *Patterson*, 20 F.3d at 814. "Evidence of prior bad acts will always be prejudicial, and it is the trial court's job to evaluate whether the guaranteed risk of prejudice outweighs the legitimate contribution of the evidence." *Id.* Mr. Shumway makes no more than conclusory statements the district court admission of the 404(b) evidence was prejudicial to his defense. However, "we are required to give the trial court 'substantial deference' in Rule 403 rulings." *Id.* In light of the district court's explicit findings the 404(b) evidence's probative value was not substantially outweighed by its potential for prejudice, and because Mr. Shumway fails to convince us otherwise, we find no abuse of discretion. Therefore, we affirm the district court's determination the

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probative value of the 404(b) evidence was not substantially outweighed by its potential for prejudice.

C. Limiting Instruction

Huddleston's fourth prong requires the district court, upon request, to instruct the jury that the 404(b) evidence is to be considered only for the proper purpose for which it was admitted. 485 U.S. at 691-92, 108 S.Ct. at 1502. Here, the district court properly gave such a limiting instruction to the jury that the 404(b) evidence was to be considered only for the purposes of intent, knowledge and identity. Having therefore determined the admission of the 404(b) evidence satisfied every element of Huddleston, 485 U.S. at 691- 92, 108 S.Ct. at 1502, we hold the district court did not abuse its discretion in admitting the prior acts evidence under Fed.R.Evid. 404(b).

IV. SENTENCING--Base Level Enhancements

A. Vulnerable Victim

[16] At sentencing, the district court enhanced Mr. Shumway's base offense level by two points under USSG § 3A1.1(b), which provides:

If the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible to the criminal conduct, increase by 2 levels. We must now decide whether the human skeleton of an Anasazi infant is a "vulnerable victim" for purposes of § 3A1.1(b) of the Sentencing Guidelines.

[17] Normally, a district court's determination of a "vulnerable victim" for purposes of USSG § 3A1.1(b) is a question of fact reviewable for clear error. *United States v. Hardesty*, 105 F.3d 558, 559 (10th Cir.1997). Here, however, the question is not so clear-cut; rather, the question is whether USSG § 3A1.1(b) properly is interpreted to include skeletal remains as "vulnerable victims." This question deals with the district court's interpretation of the Guidelines, which we review de novo. *United States v. Frazier*, 53 F.3d 1105, 1111 (10th Cir.1995). We hold *1423 USSG § 3A1.1(b) does not apply to prehistoric human skeletal remains. [FN4] We are convinced that to interpret "vulnerable victim" to include skeletal remains would stretch the imagination, and would render application of USSG § 3A1.1(b) potentially absurd.

FN4. This is not to say, however, that we do not recognize the special import of this case's context. We are aware of the increasing need for the protection of Native American burial sites, and we in no way intend to diminish the cultural importance of those sites nor the importance of a commitment to the preservation of those sites. Nevertheless, we are left with somewhat of a conundrum. Grave robbing, especially grave robbing the sacred objects of Native Americans, is undoubtedly detestable conduct worthy of severe castigation; however, such castigation cannot come at the expense of reason and common sense. Certainly, better means exist to deter the loathsome conduct of grave robbers than to drain the term "vulnerable victim" of any reasonable meaning.

[18] The status of "vulnerable victim" hinges on the idea that some characteristic renders a victim "particularly susceptible" to the criminal conduct. In other words, the "vulnerable victim" is someone who is unable to protect himself or herself from criminal conduct, and is therefore in need of greater societal protection than the average citizen. *United States v. Brunson*, 54 F.3d 673, 676 (10th Cir.), cert. denied, --- U.S. ---, 116 S.Ct. 397, 133 L.Ed.2d 317 (1995). Skeletons certainly are completely unable to defend against criminal conduct. However, to illustrate the absurdity of applying the "vulnerable victim" status to a skeleton, consider for example, a pile of cremated remains, or a pile of dirt that was once a pile of bones; if skeletal remains are "vulnerable victims," certainly, then, these types of remains also should qualify. These types of human remains are undoubtedly no more able to guard against criminal harm than a buried infant skeleton, yet can they qualify as a victim? Our answer is an unqualified no. These examples illustrate the untenable results application of the Guidelines to skeletal remains would have, and this we refuse to justify.

In support of the proposition the infant skeleton qualifies as a "vulnerable victim" under USSG § 3A1.1(b), the government relies on *United States v. Roberson*, 872 F.2d 597 (5th Cir.), cert. denied, 493 U.S. 861, 110 S.Ct. 175, 107 L.Ed.2d 131 (1989), and *United States v. Quintero*, 21 F.3d 885 (9th Cir.1994). In *Roberson*, the defendant's eighty-four-year-old roommate died after falling and hitting his head on a table. 872 F.2d at 599. The defendant feared the police would think he killed the man, so he put the body in his car and drove around Texas for several days. *Id.* During this time, the defendant charged several thousands of dollars on the dead man's credit card. *Id.* After a few days,

the defendant put the body in a garbage dumpster, doused it with diesel fuel, and burned it beyond recognition. *Id.* The defendant was convicted of credit card fraud. *Id.* at 600. The district court enhanced the defendant's offense level pursuant to USSG § 3A1.1's "vulnerable victim" provision, *id.*, and departed upward from the guideline range finding his conduct constituted "extreme conduct" pursuant to USSG § 5K2.8. [FN5] *Id.* at 602.

FN5. USSG § 5K2.8 (1995), which has remained unchanged since its original effective date, provides: If the defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim, the court may increase the sentence above the guideline range to reflect the nature of the conduct. Examples of extreme conduct include torture of a victim, gratuitous infliction of injury, or prolonging of pain or humiliation.

On appeal, the Fifth Circuit held the district court did not err in applying either provision to the defendant's sentencing calculation. *Id.* at 608, 612. However, the circuit court did not specifically address the defendant's argument that the body could not be a "victim." *Id.* at 604. Rather, the circuit court focused on rejecting the defendant's argument that the owner of the credit card could not be a "victim" for purposes of the Guidelines if he was not a "victim" of the crime of conviction. *Id.* at 605, 608-09. The court held the Guidelines required no such nexus--USSG § 5K2.8 and § 3A1.1 did not require the "victim" for purposes of the sentencing departure to be the "victim" for purposes of the crime. *Id.* at 609. The court glossed the issue of whether a victim must be alive or dead. Consequently, *Roberson* is not particularly helpful to our "vulnerable victim" analysis.

*1424 We have a similar problem applying *Quintero*. In *Quintero*, after the defendant's two-year-old daughter died, to avoid discovery, the defendant burned the body, removed the head with a shovel, and left it at a different location several miles away. 21 F.3d at 889. At sentencing, the district court departed upward from the sentencing range finding the defendant's conduct after the girl's death constituted "extreme conduct" for purposes of USSG § 5K2.8. *Id.* at 893. On appeal, the defendant argued USSG § 5K2.8 applied only to live victims. *Id.* at 894. The Ninth Circuit affirmed the "extreme conduct" departure holding "[t]he section focuses on the defendant's conduct, not the characteristics of the victim." *Id.* The court went on to explain the term "victim" as used in USSG § 5K2.8 was meant simply to modify "degrading," and was not meant to distract from the provision's focus on the offender's conduct:

The phrase "to the victim" appears to modify the term "degrading," making the point that the Sentencing Commission was not concerned about conduct that might be degrading to the offender. By contrast, the terms "heinous," "cruel," or "brutal" conduct need no such clarification.

Id. at 894 n. 8. The *Quintero* analysis does not apply here. It is true the Guideline's "vulnerable victim" provision does, as do all the provisions, deal generally with the offender's conduct; the evident purpose of the guideline is "to punish more severely conduct that is morally more culpable and to protect such victims by adding more deterrence." *United States v. Gill*, 99 F.3d 484, 488 (1st Cir.1996). However, unlike the "extreme conduct" provision, which focuses on the nature of the offender's conduct, the "vulnerable victim" enhancement focuses heavily on the characteristics of the crime's victim. This, we find, is a compelling distinction, for in provisions such as the USSG § 5K2.8 "extreme conduct" provision, the state of the victim, living or dead, is of far less consequence. As a result, our holding here is not intended to limit the application of provisions such as § 5K2.8, which focus on the offender's conduct. We leave for another day the question whether the "extreme conduct" provision, or like provisions, could properly apply to this case, or any case where the supposed "victim" is no longer among the living.

For all these reasons, we hold the skeletal remains in this case could not constitute a "vulnerable victim" for purposes of sentencing enhancement under § 3A1.1(b). Consequently, we remand this case for resentencing without the "vulnerable victim" two-point enhancement. [FN6]

FN6. Mr. Shumway also makes the following two arguments the "vulnerable victim" enhancement was in error: the "vulnerable victim" enhancement was improper because there was no evidence Mr. Shumway "targeted" the victim, and the enhancement was improper because the skeletal remains did not constitute an "unusually vulnerable victim." See, e.g., *Hardesty*, 105 F.3d at 560; *Brunson*, 54 F.3d at 677. Because we reverse the district court's application of the enhancement to Mr. Shumway's sentence on other grounds, we need not address these arguments.

B. Calculation of Loss

[19] Mr. Shumway argues the district court erred in its method of calculating loss. On appeal, while we review the

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district court's factual findings for clear error, we review de novo questions of what factors the district court may consider in assessing loss under the Guidelines. *United States v. Williams*, 50 F.3d 863, 864 (10th Cir.1995).

[20] The district court applied USSG § 2B1.3 when it calculated Mr. Shumway's offense level. Section 2B1.3(b)(1) directs the court to § 2B1.1 to calculate loss. The district court calculated loss at "[m]ore than \$120,000," which, pursuant to USSG § 2B1.1(b)(1)(J), increased Mr. Shumway's offense level by nine points.

Application note 2 of § 2B1.1 explains that when property is taken or destroyed, "loss is the fair market value" of the property taken, and when property is damaged, "loss is the cost of repairs, not to exceed the loss had the property been destroyed." Application note 2 also provides: "Where the market value is difficult to ascertain or inadequate to measure harm to the victim, the court may measure loss in some other way." USSG § 2B1.1 comment. (n. 2). Specifically relying on this second provision, the district court turned to the regulations promulgated pursuant *1425 to the Archaeological Resources Protection Act to calculate loss. 16 U.S.C. § 470ii; 43 C.F.R. § 7.14. Section 470ee of the Archaeological Resources Protection Act, the statute under which Mr. Shumway was convicted and which he admitted violating, identifies archaeological value and cost of repair as relevant factors in determining the violation's severity. 16 U.S.C. § 470ee(d). 43 C.F.R. § 7.14 defines both "archaeological value" and "cost of repair." [FN7] During Mr. Shumway's trial, two archaeologists testified as to both "archaeological value" and "cost of restoration and repair," as determined under 43 C.F.R. § 7.14, and estimated the total damage to both the Dop-Ki Cave and Horse Rock Ruin at about \$96,500. Also, an archaeological damage assessment report was prepared for the two additional sites damaged in the counts to which Mr. Shumway pleaded guilty. The damage report estimated damage to those additional sites at about \$40,700. Because the sentencing was consolidated to sentence Mr. Shumway both for the results of his conviction and for the results of his guilty plea, the district court added these two estimates of loss as calculated pursuant to 43 C.F.R. § 7.14 to enhance Mr. Shumway's sentence.

FN7. Specifically, 43 C.F.R. § 7.14 provides:

§ 7.14 Determination of archaeological or commercial value and cost of restoration and repair

(a) Archaeological value. ... [T]he archaeological value of any archaeological resource involved in a violation of the prohibitions in § 7.4 ... shall be the value of the information associated with the archaeological resource. 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 report as would be necessary to realize the information potential.

...

(c) Cost of restoration and repair. ... [T]he cost of restoration and repair of archaeological resources damaged as a result of a violation of prohibitions or conditions ... shall be the sum of the costs already incurred for emergency and restoration or repair work, plus those costs projected to be necessary to complete restoration and repair....

Mr. Shumway argues the court should have relied solely on the cost of repairs to the sites and the fair market value of the artifacts taken to calculate a loss of \$9,122. Mr. Shumway argues the court's method of calculation was not one contemplated by the Guidelines and resulted in an incorrect standard of measure. We disagree.

[21] For purposes of determining an appropriate offense level under the Guidelines, "loss" is not simply intended to be a measure of net monetary damage. "Loss" also serves to "gauge the severity of a particular offense." *United States v. Lara*, 956 F.2d 994, 999 (10th Cir.1992). Here, the district court quoted part of USSG § 2B1.1's application note 2, and specifically relied on the language stating where the market value of the property at issue is "inadequate to measure harm to the victim," the court may determine loss some other way. By expressly relying on this language, the district court implicitly found the fair market value of the artifacts inadequately reflected the level of harm Mr. Shumway inflicted. As a result, the district court turned to the objective measure of damage as reflected in regulations specific to the statute Mr. Shumway was convicted of violating-- 43 C.F.R. § 7.14.

Congress enacted the Archaeological Resources Protection Act to ensure for the present and future benefit of the American people, irreplaceable aspects of Native American history and culture. 16 U.S.C. § 470aa(a), (b). We agree with the district court the paltry sum of \$9,122, the asserted cost of the artifact's fair market value and cost of restoration and repair, fails to reflect adequately the extent of damage Mr. Shumway inflicted. The fair market value and cost of

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repair calculation was grossly insufficient to quantify the devastating and irreparable cultural, scientific and spiritual damage Mr. Shumway caused to the American people in general and to the Native American community in particular. The Guidelines provided the district court could calculate loss in some way other than fair market value and cost of repair, if those calculations were inadequate. USSG § 2B1.1 comment. (n. 2). The district court relied on this flexible provision and used a reasonable and objective measure specifically *1426 formulated to calculate damages under the statute Mr. Shumway was convicted of violating to calculate loss for purposes of sentencing. 43 C.F.R. § 7.14. We hold the district court's method of calculating loss for the purposes of sentencing was proper.

C. Obstruction of Justice

[22] Mr. Shumway argues the district court erred in enhancing his offense level for obstruction of justice pursuant to USSG § 3C1.1. On appeal, we review the district court's factual findings on this issue for clear error and its legal conclusions de novo. *United States v. Pretty*, 98 F.3d 1213, 1221 (10th Cir.1996), petition for cert. filed (U.S. Feb. 5, 1997) (No. 96-7768).

[23] Under the Guidelines, the district court must enhance the defendant's offense level by two "[i]f the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense." USSG § 3C1.1. Perjury can be the basis for such an enhancement. *Id.*, comment. (n. 3(b)). Under § 3C1.1, a defendant commits perjury if he or she "gives false testimony concerning a material matter with the willful intent to provide false testimony." *United States v. Dunnigan*, 507 U.S. 87, 94, 113 S.Ct. 1111, 1116, 122 L.Ed.2d 445 (1993); *Pretty*, 98 F.3d at 1221.

[24] The district court enhanced Mr. Shumway's offense level by two for obstruction of justice after finding Mr. Shumway committed perjury during the hearing in which he pleaded guilty to the 1994 three-count indictment. Specifically, the district court found Mr. Shumway perjured himself by testifying that his codefendant in the 1994 case, Mr. Verchick, did not assist him in any digging, and did not go into the alcoves at issue with him. Mr. Verchick later pleaded guilty to the charges against him and testified he entered the alcoves with Mr. Shumway. The district court found, therefore, Mr. Shumway had committed perjury and the two-level enhancement pursuant to § 3C1.1 was warranted.

Mr. Shumway argues the obstruction of justice enhancement was in error because the false statements were not "material" as defined by the Guidelines. [FN8] Specifically, Mr. Shumway argues because his testimony did not specifically exculpate his codefendant, Mr. Shumway's false statements were not "material" for purposes of § 3C1.1. Because we find no evidence the district court's findings are in clear error, and because we find the district court's application of the Guideline proper, we affirm the enhancement.

FN8. For purposes of § 3C1.1, "material" is defined as: "evidence, fact, statement, or information that, if believed, would tend to influence or affect the issue under determination." USSG § 3C1.1, comment. (n. 5).

In *United States v. Bernaugh*, 969 F.2d 858, 862 (10th Cir.1992), we affirmed the district court's obstruction of justice enhancement where, during his guilty-plea hearing, the defendant made false statements regarding his codefendant's illegal activities. We held the district court's obstruction of justice enhancement was proper because "the section 3C1.1 enhancement applies where a defendant attempts to obstruct justice in a case closely related to his own, such as that of a codefendant." *Bernaugh*, 969 F.2d at 861. The same is true here. Mr. Shumway made false statements regarding his codefendant's role in an apparent attempt to relieve his codefendant of criminal liability. Mr. Shumway argues that while his testimony regarding his codefendant was "less than forthcoming," the testimony was not "materially" perjurious because Mr. Shumway did not provide a story that fully exculpated his codefendant. However, to sustain a USSG § 3C1.1 enhancement, a defendant need not provide a story that when believed, would fully exculpate his or her codefendant. Rather, it is enough that a defendant provides false information bearing on the extent of the codefendant's criminal liability. *Bernaugh*, 969 F.2d at 862. Therefore, because Mr. Shumway made false statements bearing on the criminal liability of his codefendant, we hold the district court properly enhanced his offense level pursuant to USSG § 3C1.1.

*1427 V. SENTENCING--Upward Departure

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The presentence report assigned Mr. Shumway a criminal history category of III. Mr. Shumway's criminal history, combined with the enhanced offense level of 22, resulted in an applicable sentencing range under the Guidelines of 51 to 63 months. During sentencing, the district court relied on USSG § 4A1.3, p.s., which suggests a district court adjust the criminal history category if "reliable information" convinces the court the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct, or likelihood the defendant will commit future crimes. USSG § 4A1.3, p.s. The district court looked to several factors and determined Mr. Shumway's criminal history category of III did not adequately reflect the seriousness of his past conduct, nor the likelihood he would commit future crimes. After determining the criminal history category of III was inadequate, the district court treated Mr. Shumway as if he had one additional felony conviction, which resulted in an adjusted criminal history category of IV. The court then referenced the sentencing range for a defendant with an offense level of 22 and a criminal history category of IV--63-78 months--and sentenced Mr. Shumway to seventy-eight months.

Mr. Shumway argues the district court's upward departure was in error for three reasons: 1) the district court did not adequately articulate its reasons for departure; 2) the district court was unclear as to whether it considered factors already taken into account by the Guidelines; and 3) the departure was not reasonable.

[25][26][27] On appeal, we review the district court's decision to depart from the Sentencing Guidelines for an abuse of discretion. *Koon v. United States*, 518 U.S. 81, ---, 116 S.Ct. 2035, 2043, 135 L.Ed.2d 392 (1996); *United States v. Contreras*, 108 F.3d 1255, 1270 (10th Cir.1997). A district court may depart from the applicable sentencing range if "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration" by the Guidelines. 18 U.S.C. § 3553(b) (1994); *Koon*, --- U.S. at ---, 116 S. Ct at 2044. "Before a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline." *Koon*, --- U.S. at ---, 116 S. Ct at 2046. The district court has an "institutional advantage" over appellate courts in making these sorts of determinations due to extensive experience in applying the Guidelines. Nevertheless, "[a] district court by definition abuses its discretion when it makes an error of law," such that "[t]he abuse of discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions." *Koon*, --- U.S. at ---, 116 S.Ct. at 2047-48. Once we determine whether the district court has abused its discretion in departing from the Guidelines, we review the departure for reasonableness. 18 U.S.C. § 3742(e)(3); *United States v. White*, 893 F.2d 276, 278 (10th Cir.1990); cf. *Williams v. United States*, 503 U.S. 193, 204, 112 S.Ct. 1112, 1121, 117 L.Ed.2d 341 (1992) (even if district court departs from the Guidelines based on an erroneous factor, appellate court may affirm the sentence if it is satisfied the district court would have made the same sentence without the erroneous factor, and the degree of departure is reasonable).

[28] We now turn to the question whether the district court abused its discretion in departing from the Guidelines. The presentence report documented Mr. Shumway's extensive past illegal conduct of looting archaeological sites. Part of this evidence included Mr. Shumway's own statements at a trial related to his 1984 illegal acts at Horse Rock Ruin. Specifically, Mr. Shumway stated under oath he had been digging artifacts from public lands since a young age and had looted archaeological sites "thousands of times." Additionally, Mr. Shumway appeared in a videotaped documentary that focused on the looting of archaeological sites in San Juan County, Utah. In the documentary, Mr. Shumway discussed how low the chances were of an experienced looter being caught. The presentence report also summarized an article in which Mr. Shumway was quoted as saying: "If the government can come down here and say we don't *1428 have the right to dig in a place where we've lived all our lives, I'd just as soon go to prison. I'm not gonna bring my kid into a world where you can't go out and dig up an old ruin."

The district court considered this information set out in the presentence report and found Mr. Shumway had looted "at least 100 other times" than those which resulted in convictions, and had "made a way of life out of pot hunting down there on government lands and apparently thought or may still think that he has the right to do this". Additionally, the district court found "there's a strong likelihood he will commit other crimes." Based on these findings, the district court treated Mr. Shumway as if he had one additional felony, and added three criminal history points, which resulted in a criminal history category of IV.

We conclude the district court did not abuse its discretion in departing from the Guidelines. The court relied on USSG § 4A1.3, p.s., which allows a court to use "reliable information" in determining whether to adjust the criminal history category. Specifically, USSG § 4A1.3(e) lists "prior similar adult conduct not resulting in a criminal conviction" as reliable information. In determining Mr. Shumway's past criminal conduct was sufficiently unusual to warrant an upward

departure from the guideline range, the district court relied on Mr. Shumway's own admissions of his repeated illegal looting of archaeological sites, and relied on the probability Mr. Shumway would commit similar crimes in the future based on his "pot hunting" way of life, and his apparent belief he had every right to engage in such conduct. The district court relied on factors specifically listed in USSG § 4A1.3, and we remain unconvinced the district court abused its discretion in departing from the guideline range based on these factors.

[29] Mr. Shumway's arguments the district court failed to articulate its reasons for departure, and that the district court may have applied factors already taken into account by the Guidelines do not convince us otherwise. The district court articulated the information it relied on in making its decision to depart; it is clear the district court did not rely on factors already taken into account by the Guidelines. Rather, the district court relied on USSG § 4A1.3(e), p.s., which is an "encouraged factor" for departure. An "encouraged factor" is one " 'the Commission has not been able to take into account fully in formulating the guidelines.' " Koon, -- U.S. at ---, 116 S.Ct. at 2045 (quoting USSG § 5K2.0). Indeed, USSG § 4A1.3 comment. (backg'd.) states: "This policy statement recognizes that the criminal history score is unlikely to take into account all the variations in the seriousness of criminal history that may occur." Consequently, the district court did not erroneously rely on factors the Guidelines had already taken into account. The district court relied on information that was sufficiently unusual to take Mr. Shumway's case outside the Guidelines' heartland.

[30] Mr. Shumway also argues the district court's departure was not reasonable. We disagree. In assessing whether the degree of departure was reasonable, we consider the district court's reasons for imposing the particular sentence together with factors such as: "the seriousness of the offense, the need for just punishment, deterrence, protection of the public, correctional treatment, the sentencing pattern of the Guidelines, the policy statements contained in the Guidelines, and the need to avoid unwarranted sentencing disparities." White, 893 F.2d at 278, 18 U.S.C. § 3742(e)(3); 18 U.S.C. § 3553(a); see also Williams, 503 U.S. at 203-04, 112 S.Ct. at 1120-21.

The district court added three points to Mr. Shumway's criminal history level after analogizing Mr. Shumway's history to a defendant with one additional felony conviction. Such analogies are specifically provided for in USSG § 4A1.3, p.s.:

In considering a departure under this provision, the Commission intends that the court use, as a reference, the guideline range for a defendant with a higher or lower criminal history category, as applicable. For example, if the court concludes that the defendant's criminal history category of III significantly under-represents the seriousness of the defendant's criminal *1429 history, and that the seriousness of the defendant's criminal history most closely resembles that of most defendants with Criminal History Category IV, the court should look to the guideline range specified for a defendant with Criminal History Category IV to guide its departure.

The district court closely followed this provision by adding the same number of criminal history points as if Mr. Shumway had one additional prior felony conviction.

[31] The district court may use any " 'reasonable methodology hitched to the Sentencing Guidelines to justify the reasonableness of the departure,' " which includes using extrapolation from or analogy to the Guidelines. United States v. Jackson, 921 F.2d 985, 991 (10th Cir.1990) (quoting United States v. Harris, 907 F.2d 121, 124 (10th Cir.1990)). Here, the district court was explicit in its method of departure. Additionally, the departure is consistent with the factors to be considered in imposing a sentence under 18 U.S.C. § 3553(a). We hold the district court's degree of departure from the Guidelines was reasonable.

Accordingly, the district court is AFFIRMED in part and REVERSED in part, and we REMAND to the district court for resentencing in accordance with this opinion.

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA,	:	94-CR-185W
	:	95-CR-97W
Plaintiff,	:	
	:	
vs.	:	RESENTENCING MEMORANDUM
	:	
EARL K. SHUMWAY,	:	
	:	
Defendant.	:	
	:	

The United States of America, by and through its undersigned counsel, hereby respectfully submits its memorandum concerning the defendant's resentencing following remand from the Court of Appeals for the Tenth Circuit. In essence, the government implores the Court to resentence defendant to the same terms of imprisonment, supervised release, restitution and special assessment as originally imposed. This sentence will result from the Court making the same Sentencing Guidelines

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findings and criminal history departure determination as previously made, with the sole exception of departing upward two offense levels pursuant to USSG § 5K2.8 for defendant's "extreme conduct" in desecrating Native American human remains during his commission of four of the seven felony offenses for which he is being sentenced (rather than the two level adjustment for vulnerable victim as originally imposed).

LEGAL PRINCIPLES CONCERNING RESENTENCING

1. In United States v. Smith, 930 F.2d 1450, 1456 (10th Cir.), cert.denied, 502 U.S. 879 (1991), the Tenth Circuit held that an order vacating a sentencing and remanding for resentencing "directs the sentencing court to begin anew, so that 'fully de novo resentencing' is entirely appropriate. . . . Therefore, no prejudice results from the reconsideration of sentencing factors under the guidelines."

2. At resentencing, the Court cannot consider any events that arose after the first sentencing hearing. United States v. Warner, 43 F.3d 1335, 1340 (10th Cir. 1994).

3. Where resentencing occurs as a result of an appellate court finding that the original sentence was unlawful in some respect and remands for resentencing, and the second sentence is more onerous or severe than the original one, there is no double

jeopardy violation because a defendant can acquire no legitimate expectation of finality in an illegal sentence. United States v. DiFrancesco, 449 U.S. 117, 137 (1980); United States v. Welch, 928 F.2d 915 (10th Cir.), cert.denied, 502 U.S. 850 (1991).

THE GOVERNMENT'S "MOTION FOR UPWARD DEPARTURE
FROM THE SENTENCING GUIDELINES" IS AGAIN BEFORE
THE COURT FOR FULL CONSIDERATION, WITH
PARTICULAR EMPHASIS NOW ON THE AGGRAVATING
SENTENCING FACTOR OF DEFENDANT'S WANTON
DESECRATION OF NATIVE AMERICAN HUMAN REMAINS

Prior to the original sentencing hearing, the government moved for upward departure in the offense level as well as the criminal history category. (Docs. 81 and 82, no. 94-CR-185W; docs. 39 and 40, no. 95-CR-97W.) For the Court's convenience, the government's motion and supporting memorandum are attached. Because the resentencing is a de novo proceeding, the government requests the Court to give full consideration to the motion for upward departure, with supporting memorandum. The Motion sets forth "two separate and distinct grounds" for upward departure from the sentencing guidelines:

1. An upward departure in the defendant's offense level pursuant to USSG § 2B1.3 comment. (n.4).
2. An upward departure in the defendant's criminal history category pursuant to USSG § 4A1.3(e).

This Court granted the motion as to the second ground, and departed upward in the defendant's criminal history from category III to category IV. This ruling was upheld by the Tenth Circuit in United States v. Shumway, ___ F.3d ___, ___, 1997 WL 226199 (10th Cir. May 6, 1997). The government respectfully requests this Court to make the same ruling concerning the defendant's criminal history.

Concerning an upward departure in the offense level, the memorandum in support of the government's motion set forth the two grounds upon which this departure was being sought:

1. The gross inadequacy of the sentencing guidelines for violations of the Archaeological Resources Protection Act of 1979 (ARPA) and related archaeological resource violations.

2. The facts of the instant cases, involving the looting and damaging of three separate archaeological sites and the desecration of two prehistoric graves, not only support but mandate that full sentencing consideration be given these intolerable criminal acts by way of upward departure. (Emphasis added to original memorandum).

At the first sentencing hearing, this Court addressed the government's argument concerning the inadequacy of the sentencing guidelines in these types of cases by finding that any inadequacy

was remedied by two separate and distinct sentencing determinations made by the Court: (1) the "loss" calculation, which included the archaeological value amount, and (2) the "vulnerable victim" adjustment.

The Court's comments at sentencing made clear that, but for these two determinations which substantially increased the offense level (nine levels for the "loss" calculation" and two levels for desecrating Native American "victim" burials), the sentencing guidelines would be wholly inadequate to properly gauge the severity of defendant's conduct:

"I think the sentence guidelines are adequate under 2B1.3. There's no way to ever compensate the Native Americans for what's occurred out there. But given the guidelines that I'm obligated to follow, and by reason of the enhancement for the amount that I put in and the vulnerable victim enhancement and total offense level of 22 here, I'm not going to depart upward on that ground.

Tr. of Sentencing; Dec. 15, 1995; at p.54 (emphasis added).

This ruling was made after defense counsel had strenuously argued that it would constitute double counting for the Court to depart upward in the offense level due to inadequacy of the guidelines in ARPA cases, after the Court had already made its "loss" and "vulnerable victim" determinations.

Now one of the two foundations for the Court's prior ruling has been removed. Because the "vulnerable victim" enhancement

was found to be erroneous by the Tenth Circuit, the inadequacy of the sentencing guidelines, as relating to the desecration of human remains, must be considered anew by this Court.

The government's position now is simply this. Although the Court and the Tenth Circuit have determined that the archaeological value "loss" calculation adequately assesses the nature and severity of the "looting" ARPA offenses committed by defendant, there is now no separate and distinct consideration given to defendant's conduct in desecrating human remains during the commission of these offenses.

In other words, had there been no Native American human remains desecration committed by defendant, the "loss" figure would be essentially the same. Thus, the nine level adjustment accounts for the archaeological damage done by defendant, but takes no account of his desecration of human remains. That conduct was described by this Court during the sentencing hearing in these strong terms:

Mr. Furner concluded that human remains disturbed in one of the counts in each of the two cases qualified for the vulnerable victim adjustment. And there's no question in this case particularly on the evidence that I heard that 97W that this is terrible, and I don't want to get emotional or sound like that has anything to do with it, but this deceased Native American that had been buried in that area hundreds of years ago was just dug up and desecrated in the most horrible way, which is of course, the grossest kind of

a front to our Native American citizens which is referred to on Page 38, Paragraph 11 of Mr. Furner's report, a statement from Mr. Willie Numkena who is the executive director of the Utah Division of Indian Affairs.

Tr. of sentencing hearing, at 22-23 (emphasis added).

The Tenth Circuit Court of Appeals likewise did not hesitate to characterize defendant's conduct relative to human remains:

We are aware of the increasing need for the protection of Native American burial sites, and we in no way intend to diminish the cultural importance of those sites nor the importance of a commitment to the preservation of those sites . . . Grave robbing, especially grave robbing the sacred objects of Native Americans, is undoubtedly detestable conduct worthy of severe castigation . . .

Shumway, ___ F.3d at ___, 1997 WL 226199, * 15 (n.4) (emphasis added).

The Tenth Circuit suggested a means by which these concerns about Native American graves protection, and the associated aggravating sentencing factor, could be addressed in a case such as this. Without indicating, of course, what its ruling would ultimately be on the issue, the Court cited the departure provision for "extreme conduct" under USSG § 5K2.8 as one method of assessing conduct involving desecration of human remains:

(U)nlike the "extreme conduct" provision, which focuses on the nature of the offenders conduct, the "vulnerable victim" enhancement focuses heavily on the characteristics of the crimes victim. This, we find, is a compelling distinction,

for improvisations such as the USSG § 5K2.8 "extreme conduct", the state of the victim living or dead, is of far less consequence. As a result, our holding here is not intended to limit the application of provisions such as § 5K2.8, which focus on the offender's conduct. We leave for another day the question whether the "extreme conduct" provision, or like provisions, could properly apply to this case, or any case where the supposed "victim" is not longer among the living.

Shumway, ___ F.3d at ___, 1997 WL 226199, *9 (emphasis added).

The original memorandum in support of the government's motion for upward departure addressed the extent of departure warranted by defendant's conduct in desecrating two human remains at separate archaeological sites looted by him:

The defendant's extensive desecration and defilement of prehistoric graves deserves specific consideration for sentencing purposes. The interests of justice and the victims of such reprehensible conduct deserves no less. The first factor listed in federal law for a sentencing court to consider is that the sentence be imposed "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense . . ." 18 U.S.C. § 3553(a)(2)(A). The defendant's conduct relative to human remains and prehistoric graves is a substantial part of the "seriousness of (his) offense(s)." Id. The degree of upward departure must take this unique factor into consideration.

. . . The United States respectfully suggests that at the very least, an additional four level upward departure be applied for the defendant's desecration and defilement of human remains and prehistoric graves.

Memorandum in Support of Upward Departure, at 8-9.

Although we remain convinced that at least a four level upward departure for "extreme conduct" is merited, and that imposition of such at resentencing would not constitute double jeopardy (see citations above), we also recognize that this Court has previously determined that the two level adjustment under § 3A1.1 adequately addressed the defendant's desecration conduct and the associated Native American concerns. Consequently, the government now respectfully suggests that the upward departure under § 5K2.8 be two levels only. Of course, it will necessary for the Court to make the appropriate findings concerning the upward departure, as required by Tenth Circuit authority (see original memorandum at 2-3).

A two level upward departure is easily justified. In the most analogous and applicable guideline (§ 2B1.3) for defendant's offenses, the Sentencing Commission included a two level specific offense characteristic for "more than minimal planning." Surely, the wanton desecration of human remains is as much an aggravating sentencing factor as "more than minimal planning." If there was a specific sentencing guideline for ARPA offenses, we are certain that it would include a specific offense characteristic for the disturbance of human remains during the commission of an archaeological resource crime. This is precisely why the

guidelines are currently inadequate for ARPA offenses: failure to account for this important offense characteristic. We are also convinced that the Sentencing Commission would assign much more than two levels to a specific offense characteristic for disturbance and desecration of human remains.

CONCLUSION

At the first sentencing hearing, the Court sought a just sentence which appropriately included some punishment for defendant's wanton conduct in desecrating Native American human remains. Nothing less should be sought at resentencing. The Tenth Circuit held only that the wrong provision of law was utilized to give proper sentencing consideration to defendant's "detestable conduct," not that such behavior was immune from punishment. This Court should simply use a different vehicle to travel again to the correct destination -- a just sentence commensurate with defendant's full culpability.

RESPECTFULLY SUBMITTED this _____ day of June, 1997.

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