

88 F.3d 614  
(Cite as: 88 F.3d 614)

**BLACK HILLS INSTITUTE OF GEOLOGICAL RESEARCH, INC., a South Dakota  
corporation,  
Appellant,**

**v.**

**Maurice WILLIAMS, Appellee.**

**No. 95-3312.**

United States Court of Appeals,  
Eighth Circuit.

Submitted May 15, 1996.

Decided July 5, 1996.

Research institute sought to compel return of Tyrannosaurus rex fossil seized by United States after institute excavated fossil from land within Cheyenne River Sioux Reservation that was held by United States in trust for individual Indian. The United States District Court for the District of South Dakota, Richard H. Battey, Chief Judge, denied preliminary injunction, and institute appealed. The Court of Appeals, 967 F.2d 1237, affirmed. On remand after further appeal, 978 F.2d 1043, the District Court, 812 F.Supp. 1015, entered judgment in favor of United States. Institute appealed. The Court of Appeals, 12 F.3d 737, affirmed in part and reversed in part. Institute filed lien statement under South Dakota law and brought state court action seeking statutory or common law lien for excavation and preparation of fossil. Upon removal, the District Court granted summary judgment in favor of fossil owners. Institute appealed. The Court of Appeals, Magill, Circuit Judge, held that institute was not entitled to either equitable or statutory lien against fossil.

Affirmed.

**[1] LIENS k7**

239k7

"Equitable lien" is implied and declared by court of equity out of general considerations of right and justice as applied to relations of parties and circumstances of their dealings.

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

**[2] LIENS k7**

239k7

While equity will impose lien in favor of bona fide purchaser who improves purchased item in mistaken belief that he is true owner, equity will not impose lien in favor of one who makes improvements knowing that title is in another.

**[3] FEDERAL COURTS k850.1**

002104

170Bk850.1

Court of Appeals reviews factual determination only for clear error.

**[4] SALES k235(3)**

343k235(3)

Given its failure diligently to investigate whether *Tyrannosaurus rex* fossil excavated from Indian trust land located within Cheyenne River Sioux Indian Reservation could be alienated by individual Indian beneficial owner absent federal government approval, research institute could not be considered a bona fide purchaser and was thus not entitled to equitable lien for cost of excavating and preparing fossil.

**[5] SALES k235(3)**

343k235(3)

Purchaser who has knowledge of facts that would cast doubt upon transferability of title has duty to investigate that title, and lack of caution and diligence in such situations amounts to bad faith.

**[6] LIENS k8**

239k8

Research institute did not meet requirements for statutory lien for excavation and preparation of fossil wrongfully taken from Indian trust land, as South Dakota law provided for cessation of lien 120 days after completion of any work on or furnishing of skill, services, or material to fossil unless statement of lien was filed within such period and statement was not filed until United States, which had seized fossil almost two years earlier, was determined to hold title. SDCL 44-9-15.

\*615 Patrick Duffy (argued), Rapid City, South Dakota, for Appellant.

Robert Aaron Mandel, U.S. Attorney (argued), Rapid City, South Dakota, for Appellee.

Before RICHARD S. ARNOLD, Chief Judge, MAGILL, Circuit Judge, and VAN SICKLE, [FN\*] District Judge.

FN\* THE HONORABLE BRUCE M. VAN SICKLE, United States District Judge for the District of North Dakota, sitting by designation.

MAGILL, Circuit Judge.

The Black Hills Institute of Geological Research, Inc. (the Institute) appeals the district court's [FN1] holding that it was not entitled to a \$209,000 lien against a *tyrannosaurus rex* fossil for work performed in excavating and preparing the fossil. We affirm.

FN1. The Honorable Richard H. Battey, Chief Judge, United States District Court for the District of South Dakota.

I.

The facts surrounding the discovery, excavation, and preparation of the fossil are discussed at length

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in *Black Hills Inst. of Geological Research v. South Dakota Sch. of Mines & Tech.*, 12 F.3d 737 (8th Cir.1993) (*Black Hills III*), cert. denied, --- U.S. ----, 115 S.Ct. 61, 130 L.Ed.2d 18 (1994). We will discuss herein only those facts necessary for this appeal.

In August 1990, employees of the Institute discovered a tyrannosaurus rex fossil on Maurice Williams's land. The Institute excavated the fossil and gave \$5000 to Williams, allegedly in exchange for title to the fossil. Over the course of the next few years, the Institute spent approximately \$209,000 in excavating and preparing the fossil.

Williams's land, however, is located within the Cheyenne River Sioux Indian Reservation of South Dakota, which is held in trust for Williams by the United States. On December 15, 1993, this Court concluded that the fossil was held in trust by the United States for Williams and, as such, it was not alienable by Williams absent approval by the Department of the Interior (DOI). See *id.* at 742-44 (applying 25 U.S.C. §§ 464 and 483). Because the fossil was removed from the land without the knowledge or consent of the United States, the attempted sale was void and the Institute had no legal right, title, or interest in the fossil as severed from the land.

On February 8, 1994, the Institute filed a lien statement under South Dakota law, asserting a \$209,000 lien against the fossil. The Institute then filed a complaint in South Dakota state court seeking either a statutory or common law lien on the fossil for the work performed in excavating and preparing it.

The case was removed to the federal district court for the District of South Dakota. The district court granted summary judgment in favor of the defendants. The court noted that the Institute did not meet the requirements for a statutory lien, and the court refused to impose an equitable lien on \*616 the grounds that the Institute acted with willful blindness to statutes which clearly precluded the Institute from gaining rights to the fossil absent government permission. The Institute now appeals.

## II.

The law of this case is that the fossil, even after severance from the land, is held in trust by the United States for Williams and is not alienable by Williams absent DOI approval. See *id.* The Institute conceded this at oral argument, but nevertheless contends that because it spent a considerable amount of money in excavating the fossil while under a mistaken belief that the fossil was alienable, it is entitled to an equitable or statutory lien. We disagree.

### A.

[1][2] An equitable lien "is implied and declared by a court of equity out of general considerations of right and justice as applied to the relations of the parties and the circumstances of their dealings." *In re Doyen*, 56 B.R. 632, 633 (Bankr.D.S.D.1986) (citing *Farmers & Merchants Bank v. Commissioner of Internal Revenue*, 175 F.2d 846, 849 (8th Cir.1949)); see also *Dorman v. Crooks State Bank*, 55 S.D. 209, 225 N.W. 661, 664 (1929) (describing equitable lien). While equity will impose a lien in favor of a bona fide purchaser who improves the purchased item in the mistaken

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belief that he is the true owner, equity will not impose a lien in favor of one who makes improvements knowing that title is in another. See 41 Am.Jur.2d, Improvements § 11 (1995).

[3] In the present case, the district court concluded that the Institute did not act in good faith in excavating the fossil, noting that

[The Institute] was willfully blind to the existing statutes and regulations governing Indian trust land. Had [the institute] spent the time necessary to research the law, the only inescapable conclusion would have been that [the Institute] had no right to the fossil without the government's permission.

Mem. Op. at 8 (D.S.D. Aug. 11, 1995). Because the conclusion that the Institute acted in bad faith is a factual determination, we review only for clear error. See *Garwood v. American Motorists Ins. Co.*, 775 F.2d 228, 231 (8th Cir.1985).

[4][5] This Court has already noted that the Institute could have taken any number of steps to protect itself and that the fact "that the fossil was embedded in land located within the boundaries of the Cheyenne River Sioux Indian Reservation should have alerted Black Hills to the possibility that the federal government had some interest in [the fossil]." *Black Hills III*, 12 F.3d at 744. It is a long settled rule that a party who has knowledge of facts that would cast doubt upon the transferability of title has a duty to investigate that title, and that a lack of caution and diligence in such situations amounts to bad faith. See *State ex rel. Dept. of Revenue v. Karras*, 515 N.W.2d 248, 251 (S.D.1994) ("notice of facts which would put a prudent person upon inquiry[ ] impeaches the good faith of the subsequent purchaser") (quoting *Betts v. Letcher*, 1 S.D. 182, 46 N.W. 193, 196 (1890)); see also *Moelle v. Sherwood*, 148 U.S. 21, 30, 13 S.Ct. 426, 429, 37 L.Ed. 350 (1893) (bona fide nature of transaction depends in part on reasonable diligence in ascertaining whether transfer is a "mere speculative chance in the property"); *Brush v. Ware*, 40 U.S. (15 Pet.) 93, 111, 10 L.Ed. 672 (1841) (having failed to diligently investigate known facts which cast doubt upon validity of title, the purchaser cannot prejudice the rights of innocent persons through his negligence). Given the Institute's failure to diligently investigate whether the fossil could be alienated absent government approval, it cannot be considered a good faith, bona fide purchaser. It is therefore not entitled to an equitable lien in its favor.

## B.

[6] The Institute also contends that a statutory lien may be imposed in its favor. Under South Dakota law, the lien ceases 120 days after any work, skill, services, or material was furnished to the fossil, unless a statement of lien is filed within this period. S.D.C.L. § 44-9-15 (1983). The last day any \*617 work was performed on the fossil--the day it was seized by federal authorities--was May 14, 1992. The lien statement was not filed until February 8, 1994, well after the expiration of the filing period. Because the statute is quite clear that the 120-day clock begins to run upon the completion of the work, and not upon the date when the parties' interests in the item are finally adjudicated, the Institute does not meet the requirements for a statutory lien.

## III.

The Institute is not entitled to either an equitable lien or a statutory lien. Therefore, the decision of

002107

the district court is affirmed.

END OF DOCUMENT

002108

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7 Attorneys for Plaintiff  
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9 UNITED STATES DISTRICT COURT  
10 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
11 WESTERN DIVISION

RMT  
(SHX)

12 UNITED STATES OF AMERICA, )  
13 Plaintiff, )  
14 v. )  
15 ALAN VANARSDALE and DANIEL )  
16 VANARSDALE, )  
17 Defendants. )

Case No. CV **96- 3952**

COMPLAINT FOR REPLEVIN OF  
FOSSILS, FOR COMPENSATORY AND  
PUNITIVE DAMAGES, AND FOR  
DECLARATORY AND INJUNCTIVE  
RELIEF

18  
19 INTRODUCTION

20 1. This is an action to:  
21 a. obtain immediate possession of and a declaration of  
22 ownership to thousands of vertebrate and invertebrate  
23 nonrenewable specimens of fossils (hereafter the "Specimens")  
24 that have been excavated and removed from Federal land without  
25 authorization;

26  
27  
28 *RIL/VanArsdale/Complaints*

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1           5. Defendant Daniel W. VanArsdale ("Daniel") is an  
2 individual who resides and/or works in Oxnard, California,  
3 which is within the jurisdiction of this Court. Daniel is  
4 Alan's father.

5  
6                                   ALLEGATIONS COMMON TO ALL COUNTS

7           6. All vertebrate and invertebrate nonrenewable fossils  
8 that are embedded in Federal land are property of the United  
9 States.

10          7. Without the knowledge or permission of the United  
11 States, and without having first obtained permits from BLM or  
12 the Forest Service, Alan has explored, excavated, and removed  
13 vertebrate and invertebrate nonrenewable paleontological  
14 specimens from Federal land. These sites include:

- 15           a. Dream Quarry, which is located in Quatal Canyon,  
16 a part of the Los Padres National Forest in Ventura County;  
17           b. Padrones Spring, which is located in land managed  
18 by the BLM in San Luis Obispo County; and  
19           c. Apache Canyon, which is located in the Los Padres  
20 National Forest in Ventura County.

21  
22          8. Without the knowledge or permission of the United  
23 States, on or about January 14, 1992, Alan loaned approximately  
24 700-800 rodent and other small nonrenewable vertebrate specimens  
25 of fossils, dating from the Clarendonian and Hemphillian  
26 ages, to the San Bernardino County Museum (the "Museum").  
27 A description of these specimens of fossils is attached as

1 Exhibit "A." The Museum is still in possession of these  
2 specimens of fossils.

3 9. Subsequently, and without the knowledge or permission  
4 of the United States, Daniel has purported to purchase or  
5 to acquire over 20,000 unlawfully obtained vertebrate and  
6 invertebrate nonrenewable paleontological specimens from Alan,  
7 and then has offered to donate them to the Museum in order to  
8 obtain a tax benefit.

9 10. On or about September 29, 1993, Alan and/or Daniel  
10 delivered the over 20,000 unlawfully obtained vertebrate and  
11 invertebrate nonrenewable paleontological specimens to the Museum  
12 in order to offer them as a donation to the Museum. Attached as  
13 Exhibit "B" is an inventory of the Dream Quarry and Padrones  
14 Spring fossils that Daniel offered to donate. While the Museum  
15 negotiated with Alan and/or Daniel about the terms of the  
16 donation, the Museum staff tried to establish the true provenance  
17 of these specimens of fossils. The Museum staff also organized,  
18 inventoried, and cataloged the specimens of fossils which Daniel  
19 offered to donate.

20 11. Daniel claims that the specimens of fossils that he has  
21 offered to donate in September 1993 have been appraised at a  
22 value of \$51,472.







1           29. The United States should be awarded damages caused by  
2 Alan's willful defacement, disturbance, removal and/or  
3 destruction of scientific and/or historic resources, including  
4 but not limited to damages caused by the unauthorized  
5 disturbances to Federal lands, -in an amount to be determined at  
6 trial.

7           30. Because Alan's unauthorized excavation, removal, and  
8 detention of the specimens of fossils from Federal land that is  
9 managed by the BLM has been willful and wanton, in bad faith,  
10 and with full knowledge of or reckless disregard for the fact  
11 that the United States is the rightful owner of these specimens  
12 of fossils, punitive or exemplary damages should be imposed  
13 against Alan, in an amount to be determined at trial.

14                                   FIFTH CLAIM FOR RELIEF

15                   (For Declaratory Relief Against All Defendants)

16           31. Plaintiff incorporates the allegations of paragraphs  
17 1 through 14, inclusive, as though fully set forth herein.

18           32. The United States alleges that it has the sole  
19 ownership and right to possession of the Specimens. The United  
20 States is informed and believes, and alleges thereon, that  
21 defendants deny these allegations. Thus, a controversy exists as  
22 to the rightful ownership and the immediate right to possession  
23 of the Specimens.

24           33. The United States is entitled to a declaration that it  
25 has the sole ownership and immediate right to possession of  
26 the Specimens.



1 (4) That this Court impose punitive or exemplary damages  
2 against Alan for his unauthorized excavation, removal, and  
3 detention of the specimens of fossils from Federal land that has  
4 been willful and wanton, in bad faith, and with full knowledge or  
5 reckless disregard for the fact that the United States is the  
6 rightful owner of these specimens of fossils, in an amount to be  
7 determined at trial.

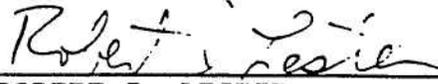
8 (5) That this Court enter a preliminary and permanent  
9 injunction against Alan, and his agents, employees, and all  
10 others in active concert or participation with him, to prohibit  
11 him from excavating and removing vertebrate and invertebrate  
12 nonrenewable fossils from Federal lands, without having obtained  
13 written, advance authorization;

14 (6) That the United States be granted its costs of suit  
15 incurred herein; and

16 (7) For such other and further relief as this Court deems  
17 just and proper.

18 DATED: June 4, 1996.

NORA M. MANELLA  
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LEON W. WEIDMAN  
Assistant United States Attorney  
Chief, Civil Division

19  
20  
21   
22 \_\_\_\_\_  
23 ROBERT I. LESTER  
Assistant United States Attorney

24 Attorneys for Plaintiff  
25 United States of America  
26  
27  
28

# N BERNARDINO COUNTY MUSEUM



COUNTY OF SAN BERNARDINO  
GENERAL SERVICES GROUP

Orange Tree Lane • Redlands, CA 92374 • (909) 798-8570

DR. ALLAN D. GRIESEMER  
Director

## Incoming Loan Agreement

Date: September 27, 1993

Loan #: IL 43

Lender's Name: Alan Van Arsdale  
Address: P.O. Box 179  
Port Hueneme, CA 93044

Phone: (805) 488-7236

Purpose of Loan: research and study  
Type of Shipment: renewal

Due Date: Sept. 27, 1994

Lender's Signature: \_\_\_\_\_

PROVED BY THE MUSEUM BY: \_\_\_\_\_

ROBERT E. REYNOLDS, Curator of Earth Science

<u>NUMBER</u>	<u>Description/Condition</u>	<u>Value</u>
41-1-20	Clarendonian specimens	DONATION?
-11	Hemphillian specimen	] DONATION? CALIFORNIA PATRON?
-11 -66	Hemphillian specimens	

APACHE CANYON AND QUINCY CANYON SPECIMENS  
IN YELLOW BOX

APACHE CANYON SPECIMENS IN GREEN BOX

Lost or damaged. Items on loan will be assessed at Fair Market Value.

-----  
Above items were returned to the lender on \_\_\_\_\_ in full and in  
good condition.

Returned to: \_\_\_\_\_

EXHIBIT A

# SAN BERNARDINO COUNTY MUSEUM

COUNTY OF SAN BERNARDINO  
GENERAL SERVICES GROUP

2024 Orange Tree Lane • Redlands, CA 92374 • 909/798-8570

DR. ALLAN D. GRIESE  
Director

## GIFT AGREEMENT

DONOR: Daniel W. Van Arsdale  
4230 Dallas, Apt. E  
Oxnard, CA 93033

DONOR NO.: A 2759

DATE: 13 March 1994

I hereby donate as an unrestricted and unconditional gift, the materials listed below which legally belong to me. I assign and transfer all right, title and interests in and to said property to the San Bernardino County Museums. Acceptance of gifts valued \$10,000. or above is contingent upon approval of the San Bernardino County Board of Supervisors.

Donor Signature: Daniel W. Van Arsdale Date: March 15, 1994

Value Estimated by: DONOR

Authorized by: Robert E. Reynolds, Curator Earth Sciences

Acc. No. Description Value Dept.  
THE FOLLOWING DENTITION SPECIMENS WERE DONATED/DELIVERED ON SEPT. 29, 1993  
A 2759

- | Acc. No. | Description                        | Value | Dept. |
|----------|------------------------------------|-------|-------|
| -1       | Scopemys sp.: Dream Quarry; LM 1/. |       |       |
| -2       | " " " " LM 1/ LEFT?                |       |       |
| -3       | " " " " LM 1/.                     |       |       |
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| -13      | " " " " LM 1/.                     |       |       |

NEWS SITE #  
+ 1 in P.A. ROOMS

see slide 17

EXHIBIT B

602120

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8 United States of America



9 UNITED STATES DISTRICT COURT

10 FOR THE CENTRAL DISTRICT OF CALIFORNIA

11 WESTERN DIVISION

12 UNITED STATES OF AMERICA, )  
13 Plaintiff, )  
14 v. )  
15 ALAN VANARSDALE and DANIEL )  
16 VANARSDALE, )  
17 Defendants. )

Case No. CV 96-3952 RMT(SHx)

NOTICE OF MOTION AND MOTION  
OF UNITED STATES OF AMERICA  
FOR PARTIAL SUMMARY JUDGMENT;

MEMORANDUM OF POINTS AND  
AUTHORITIES.

EXHIBITS [Filed under separate  
cover]

18 DATE: September 28, 1998

19 TIME: 9:30 a.m.

20 CTRM: Judge Takasugi

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002124

1 NOTICE OF MOTION AND MOTION OF THE UNITED STATES OF AMERICA  
2 FOR PARTIAL SUMMARY JUDGMENT

3 TO DEFENDANTS:

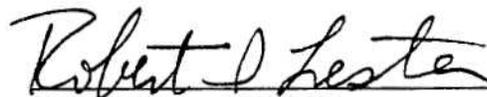
4 PLEASE TAKE NOTICE that on September 28, 1998 at 9:30 a.m.,  
5 or as soon thereafter as counsel may be heard, in the courtroom of  
6 the Honorable Robert M. Takasugi, United States District Judge,  
7 located at 312 N. Spring Street, Los Angeles, CA 90012, plaintiff  
8 United States of America will move for partial summary judgment.

9 This motion is made on the grounds that there is no genuine  
10 issue of material fact that any fossils excavated and removed from  
11 Federal Government land without a permit is property of the United  
12 States of America. Fed.R.Civ.P. 56.

13 This motion is based on this Notice of Motion and Motion, upon  
14 the Memorandum of Points and Authorities, the records in this case,  
15 and upon such other arguments as are allowed.

16 DATED: September 4, 1998. Respectfully submitted,

17 NORA M. MANELLA  
18 United States Attorney  
19 LEON W. WEIDMAN  
20 Assistant United States Attorney  
21 Chief, Civil Division

22   
23 ROBERT I. LESTER  
24 Assistant United States Attorney

25 Attorneys for Plaintiff  
26 United States of America  
27  
28

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I

3 INTRODUCTION

4 Over the course of many years, defendant Alan VanArsdale  
5 ("Alan"), a would-be paleontologist, excavated and removed large  
6 quantities of dirt from Federal land in the Ventura, Santa Barbara,  
7 and San Luis Obispo Counties area. His processing of that dirt  
8 yielded many thousands of vertebrate microfossils (collectively,  
9 the "Fossils"). He never requested and never received a permit from  
10 any Federal land managing agency to do so.

11 Over time, Alan purported to transfer ownership of many of  
12 the Fossils to his father, Daniel VanArsdale ("Daniel"). In the  
13 early 1990s, Alan delivered a few hundred of the Fossils to the  
14 San Bernardino County Museum (the "Museum") pursuant to a "loan"  
15 agreement. Then, in September 1993, Alan delivered thousands more  
16 of these Fossils to the Museum. Daniel purported to **donate** them  
17 to the Museum -- and in return, Daniel was receive a significant  
18 tax writeoff.

19 In the course of processing the purported donation, the Museum  
20 learned from Alan that he had removed the Fossils from Federal land  
21 without authorization. The Museum was concerned about that, and  
22 that Daniel was trying to receive a tax receipt for a donation of  
23 what appeared to be Government property. As a result, the Museum  
24 contacted Federal authorities, and the United States commenced an  
25 investigation.



1 II

2 FACTS

3 The following factual assertions are taken from defendants'  
4 Counterclaims (although the Court has dismissed them). Virtually  
5 all of the Fossils were found in the following manner:

6 Sedimentary rock was collected in the field  
7 using a rock hammer and knapsack. This rock  
8 was usually taken to the Cuyama River where it  
9 was eventually washed and sifted producing a  
10 "concentrate" of sand-sized particles. Next,  
11 sometimes years later, this concentrate was  
12 searched through a few grains at a time often  
13 using optical assistance, and micro-fossils  
14 detected were picked out.<sup>2</sup>

15 Further, according to the defendants, "[s]uch fossils are  
16 extremely abundant in the field." Counterclaims, ¶ 1. Continuing,  
17 Within every few years, most of the above  
18 trillion plus specimens will be destroyed by  
19 erosion, and new specimens will come toward the  
20 surface. . . . [I]t is evident that leaving  
21 micro-fossils in the field assures their  
22 destruction. And clearly collecting does not  
23 diminish the number present on the land in any  
24 meaningful way.

25  
26  
27 <sup>2</sup> First Counterclaim, ¶ 1.

1 Counterclaims ¶¶ 4-5. They claim that the value of a collection of  
2 microfossils derives "solely" from the skill and labor involved in  
3 collecting and processing the rock, "picking" the Fossils from this,  
4 and the subsequent labor spent on the rock. Counterclaim ¶ 5.

5  
6 III

7 FOSSILS EXCAVATED AND REMOVED FROM FEDERAL LAND  
8 ARE PROPERTY OF THE UNITED STATES

9 A. Introduction

10 The Seventh Circuit has neatly summarized what should be the  
11 rule in this case:

12 [T]here is no right to go upon another  
13 person's land, without his permission, to look  
14 for valuable objects buried in the land and  
15 take them if you find them.

16 United States v. Gerber, 999 F.2d 1112, 1115-16 (7th Cir. 1993),  
17 cert. denied, 510 U.S. 1071, 114 S.Ct. 878, 127 L.Ed.2d 74 (1994).

18 The Bureau of Land Management ("BLM") has explained why  
19 paleontological resources should be regulated and protected:

20 Paleontological resources constitute a fragile  
21 and nonrenewable scientific record of the  
22 history of life on earth. Once damaged,  
23 destroyed, or improperly collected, their  
24 scientific and educational value may be greatly  
25 reduced or lost forever. In addition to their  
26 scientific, educational and recreational  
27 values, paleontological resources can be used

1 to inform land managers about inter-  
2 relationships between the biological and  
3 geological components of ecosystems over long  
4 periods of time.

5 BLM Memorandum dated March 4, 1996 entitled "Mitigation and  
6 Planning Standards for the Management of Paleontological Resources  
7 on Public Lands" (Exhibit "A").

8 As set forth below, principles of common law, Federal  
9 statutes, and regulations support the conclusion that the  
10 Government, not a trespasser, owns any fossils found on or in  
11 Federal land.

12  
13 **B. Under The Common Law Of Finds, The Fossils Are The Property**  
14 **Of The United States**

15 The common law is clear that the owner of the land is the  
16 owner of any artifacts or fossils found in the land. Several cases  
17 illustrate the point. In United States v. Gerber, 999 F.2d 1112,  
18 1115-16 (7th Cir. 1993), cert. denied, 510 U.S. 1071, 114 S.Ct.  
19 878, 127 L.Ed.2d 74 (1994), the Government prosecuted Arthur Gerber  
20 for trafficking in archeological objects removed from private  
21 land in violation of state or local law, in violation of the  
22 Archaeological Resources Protection Act ("ARPA"), 16 U.S.C.  
23 § 470ee(c). Gerber had learned that a mound of land owned in  
24 Indiana by General Electric contained hundreds of artifacts.  
25 He entered the site several times, excavating and removing the  
26 artifacts from the mound. He then took these artifacts to Kentucky  
27 and sold some of them. Gerber, 999 F.2d at 1114.



1 soil, it belongs to the owner of the soil;  
2 Second, when the owner of the land where the  
3 property is found (whether on or embedded in  
4 the soil) has constructive possession of the  
5 property such that the property is not 'lost,'  
6 it belongs to the owner of the land.

7 Id. The court held that the Government "has never legally lost the  
8 subject shipwreck and, as the owner of the land on and/or in which  
9 the shipwreck is located, it owns the shipwreck." Id.<sup>3</sup>

10 Another case construing the common law is United States v.  
11 Shivers, 96 F.3d 120 (5th Cir. 1996). In the early 1900s, the  
12 Aldridge Lumber Company mill site in Jasper County Texas paid its  
13 workers in various kinds of scrip, including coin-size metal tokens  
14 stamped with the company name. After the mill was abandoned,  
15 scrip tokens remained scattered around the site. Later, the United  
16 States acquired the property, and it is included in the Angelina  
17 National Forest.

18 Billy Ray Shivers brought a metal detector to the forest in  
19 an attempt to find and unearth the Aldridge tokens. A Forest  
20 Service special agent seized from Shivers from 50-70 metal tokens.  
21 He then obtained a search warrant of Shivers' home and more  
22 Aldridge tokens were seized.<sup>4</sup> Id. at 121-22.

23  
24 <sup>3</sup> The court of appeals also rejected Klein's claim for a  
salvage award. Id. at 1514-15.

25 <sup>4</sup> The Government ultimately decided not to bring any  
26 criminal charges, and returned all of Shivers' seized items  
27 except for the tokens, claiming they were property of the  
Government. Shivers filed a Fed.R.Crim.P. 41(e) motion, seeking  
return of the tokens. Id. at 122.

1           The Fifth Circuit held that under the common law of finds,  
2 the tokens belong to the United States because the tokens had been  
3 buried in the soil of the national forest. Id. at 124. The court  
4 rejected Shivers' contention that because the tokens were excluded  
5 from coverage under ARPA, the statute conveys an ownership interest  
6 to him. Id. at 122-23. And, like the Seventh Circuit in Gerber,  
7 the Fifth Circuit in Shivers rejected the argument in favor of  
8 "encouraging unregulated amateur collection" as "virtually  
9 incomprehensible." Id. at 123.<sup>5</sup>

10           Similar principles were applied in the fossil context  
11 during the extensive litigation arising out of the excavation  
12 by Black Hills,<sup>6</sup> a private concern, of a 65 million-year-old  
13 Tyrannosaurus rex skeleton (nicknamed "Sue") in South Dakota  
14 from property owned by the United States and held in trust for  
15 Maurice Williams, an American Indian. Black Hills had purported  
16 to purchase the rights to excavate "Sue" from Mr. Williams.

---

21           <sup>5</sup> That items found on Federal government land are the  
22 property of the Federal Government is generally beyond dispute.  
23 For example, in People of the State of California ex rel. Younger  
24 v. Mead, 618 F.2d 618 (9th Cir. 1980), a 6,070-pound meteorite  
25 had been found in 1976 on Interior Department land. The court  
26 turned aside a challenge by the State of California and a museum  
to the Interior Department's grant of a permit to the Smithsonian  
Institution to remove and study the meteorite. The Federal  
Government's ownership of the meteorite was simply assumed.

27           <sup>6</sup> Black Hills Institute of Geological Research and Black  
28 Hills Museum of Natural History Foundation.

1 The Eighth Circuit, however, held that because "Sue" had become  
2 incorporated into the land,<sup>7</sup> it was therefore owned by the United  
3 States in trust for Mr. Williams (and because Mr. Williams had not  
4 satisfied the requirements to sell rights to "Sue," his attempted  
5 sale to Black Hills was void). Black Hills Institute of Geological  
6 Research v. South Dakota School of Mines and Technology, 12 F.3d  
7 737, 742-43 (8th Cir. 1993), cert. denied, 530 U.S. 810, 115 S.Ct.  
8 61, 130 L.Ed.2d 18 (1994).

9 Based on these authorities, this Court should rule that any  
10 fossils embedded in Federal land, or in the constructive possession  
11 of the Government, is property of the United States.

12  
13 C. Federal Statutes And Regulations Support The Government's  
14 Claim To Ownership Of The Fossils

15 Under the common law of finds, the Fossils in this case,  
16 which were excavated and removed from Government land, belong  
17 to the Government -- even in the absence of any statutes or  
18 regulations governing the conduct of persons on Federal land.  
19 In addition, the statutes and regulations governing the land-  
20 managing agencies<sup>8</sup> support the Federal Government's assertion of

21  
22 <sup>7</sup> The fossil was considered part of the land even though it  
23 was discovered when "portions of the fossil protruded[ed] from  
24 beneath the surface." Black Hills Institute of Geological  
25 Research v. United States Department of Justice, 812 F.Supp.  
1015, 1017 (D. S.D.), aff'd in pertinent part sub nom. Black  
24 Hills Institute of Geological Research v. South Dakota School  
25 of Mines and Technology, 12 F.3d 737, 742-43 (8th Cir. 1993),  
cert. denied, 530 U.S. 810, 115 S.Ct. 61, 130 L.Ed.2d 18 (1994).

26 <sup>8</sup> The three main Federal land-managing agencies are the  
27 National Park Service, the United States Forest Service, and the  
Bureau of Land Management.

1 its "power and intention to exercise dominion and control"<sup>9</sup> with  
2 respect to the excavation and removal of vertebrate fossils from  
3 Federal land.<sup>10</sup>

4 1. Forest Service Regulations Prohibit The Excavation And  
5 Removal Of Vertebrate Fossils Without A Special Use  
6 Authorization

7 Forest Service regulations<sup>11</sup> prohibit "excavating, damaging,  
8 or removing any vertebrate fossil . . . without a special use  
9 authorization." 36 C.F.R. § 261.9(i).<sup>12</sup> Violation of that  
10 provision subjects a person to criminal sanctions. 36 C.F.R.  
11 § 261.1b. The Forest Service's strict regulations regarding  
12 fossils is longstanding.

---

13  
14  
15  
16  
17 <sup>9</sup> Klein v. Unidentified Wrecked and Abandoned Sailing  
18 Vessel, 758 F.2d 1511, 1514 (11th Cir. 1985).

19 <sup>10</sup> The Government's power is based on the Property Clause  
20 of the Constitution, Article IV, § 3, clause 2, which vests in  
21 Congress broad powers over all public lands. Klein v.  
Unidentified Wrecked and Abandoned Sailing Vessel, 758 F.2d at  
22 1514 n. 4 (citing Kleppe v. New Mexico, 426 U.S. 529, 96 S.Ct.  
23 2285, 49 L.Ed.2d 34 (1976)).

24 <sup>11</sup> The Organic Administration Act of 1897, 30 Stat. 35,  
25 16 U.S.C. § 551 et seq., "authorizes the Secretary of Agriculture  
26 to promulgate rules and regulations to protect the national  
27 forest lands from destruction and depredation." Clouser v. Espy,  
28 42 F.3d 1522, 1529 (9th Cir. 1994), cert. denied, 515 U.S. 1141,  
115 S.Ct. 2577, 132 L.Ed.2d 827 (1995).

<sup>12</sup> The regulation provides, in full: "The following are  
prohibited: . . . (i) Excavating, damaging, or removing any  
vertebrate fossil or removing any paleontological resource for  
commercial purposes without a special use permit."

1 As least as early as 1967, the Forest Service specified  
2 that "all uses of national forest lands, improvements, and  
3 resources . . . shall be designated 'special uses,' and shall be  
4 authorized by 'special use permits.'" 36 C.F.R. § 251.1(a).  
5 Exhibit "B."<sup>13</sup> In 1977, the Forest Service specifically prohibited  
6 "Digging in, excavating, disturbing, injuring, or destroying  
7 any . . . paleontological . . . site . . . or removing, disturbing,  
8 injuring, or destroying . . . [a] paleontological . . . object,"  
9 36 C.F.R. § 261.9(e),<sup>14</sup> unless the Forest Service had issued a  
10 special use authorization, pursuant to 36 C.F.R. § 261.1a.

11 In 1981, the regulations were amended to prohibit "(g) Digging  
12 in, excavating, disturbing, injuring, destroying, or in any way  
13 damaging any paleontological . . . resource, structure, site,  
14 artifact or property" and "(h) Removing any paleontological . . .  
15 resource, structure, site, artifact or property," 36 C.F.R.  
16 § 261.9(g) & (h) (1981),<sup>15</sup> without a 36 C.F.R. § 261.1a permit.

17 Prior to the most recent amendment of the pertinent  
18 regulations in 1986, the Forest Service had prohibited the  
19 excavation and removal of any paleontological resource without  
20 a special use authorization. Since 1986, the Forest Service  
21 regulations have prohibited the "Excavating, damaging, or removing  
22 any vertebrate fossil or removing any paleontological resource

---

23 <sup>13</sup> This provision is now found at 36 C.F.R. § 251.50(a)  
24 (1997).

25 <sup>14</sup> A copy of 36 C.F.R. § 261.9(e) as it existed in 1977 is  
26 attached as Exhibit "C."

27 <sup>15</sup> 46 Fed.Reg. 33518, 33520, a copy of which is attached as  
28 Exhibit "D."

1 for commercial purposes without a special use permit." 36 C.F.R.  
2 § 261.9(i). That is, in 1986, the Forest Service, for the first  
3 time, allowed the excavation and removal of invertebrate fossils  
4 without a special use permit, unless there was a commercial purpose  
5 involved, in which case a special use permit was still required.  
6 See 51 Fed.Reg. 30355 (Aug. 26, 1986). Exhibit "E." But  
7 "[v]ertebrate fossils have traditionally been accorded special  
8 significance and will remain subject to regulation." Id.

9 Thus, the foregoing authorities show that at no time since  
10 at least 1967 has it been lawful under the regulations for  
11 Alan VanArsdale to excavate and/or remove vertebrate fossils --  
12 for any reason -- from Forest Service lands.

13 2. BLM Regulations Also Prohibit The Excavation And  
14 Removal Of Vertebrate Fossils Without A Special Use  
15 Authorization

16 Bureau of Land Management regulations<sup>16</sup> provide that --

17 (a) On all public lands, unless otherwise  
18 authorized, no person shall:

19 (1) Willfully deface, disturb, remove  
20 or destroy any . . . scientific, cultural,  
21 archaeological or historic resource, natural object  
22 or area;

23 (2) Willfully deface, remove, or  
24 destroy . . . soil . . .

25  
26 <sup>16</sup> These regulations are currently authorized pursuant to,  
27 among other things, the Section 302 of the Federal Land Policy  
and Management Act of 1976, 43 U.S.C. § 1732(b).

1 43 C.F.R. § 8365.1-5(a). The Department of the Interior has had  
2 similar fossils regulations in place since January 18, 1969.<sup>17</sup>  
3 Violation of 43 C.F.R. § 8365.1-5(a) subjects a person to criminal  
4 sanctions. 43 C.F.R. § 8360.0-7.

5 The Department of the Interior has a long-standing practice  
6 of regulating the collection of fossils. On October 12, 1956,  
7 a National Park Service memo declared that the Department of the  
8 Interior "is warranted in requiring a permit for the removal of  
9 fossils from public lands." Exhibit "E."<sup>18</sup>

10 In the 1970 edition of Interior's Departmental Manual,  
11 § 310.7.2(A) provided that the Secretary of the Interior's  
12 "jurisdiction extends to the granting of permits for the  
13 examination, excavation, or removal of archeological artifacts,  
14 paleontological specimens, or other objects of scientific  
15 interest." Exhibit "G."<sup>19</sup>

16  
17 <sup>17</sup> The Department of the Interior promulgated regulations  
18 on January 18, 1969 that the removal of vertebrate fossils from  
19 Federal lands was prohibited. 34 Fed.Reg. 857. The regulations  
20 were originally found at 43 C.F.R. § 6010.2(b)(2), and prohibited  
21 harvesting or removing any "object . . . of scientific interest,"  
22 unless permitted to by law. On September 12, 1977, these  
23 regulations were renumbered, and the same language was found at  
24 43 C.F.R. § 8363.2-2(b). Finally, on August 10, 1983, the  
25 language was somewhat revised and moved to its current location,  
26 at 43 C.F.R. § 8365.1-5(a). See 43 Fed.Reg. 40737.

27 <sup>18</sup> By doing so, Interior included fossils within the  
28 meaning of the phrase "objects of scientific interest" found  
in 16 U.S.C. § 431.

<sup>19</sup> The Manual, § 310.7.4, provided: "Permits may be granted  
only to reputable museums, universities, colleges, or other  
recognized scientific or educational institutions, or to their  
duly authorized agents." Furthermore, every collection was  
required to be preserved in a public museum. Id. § 310.7.5(J).  
That is, the grant of a permit did not pass title of the fossils  
from the Government to the permittee.

1           And in 1971, the Solicitor's Office of the Department of the  
2 Interior addressed the issue of whether fossils are included within  
3 the scope of the Antiquities Act. Exhibit "H." That Solicitor's  
4 Office memo referred to a memo by the Regional Solicitor dated July  
5 10, 1963, which held that "fossils are covered by the Antiquities  
6 Act but such coverage extends only to such fossils which are of an  
7 actual and real historic or scientific interest and of some unusual  
8 significance." The 1971 Solicitor's memo confirmed Interior's  
9 regulation of fossils on its land. It states that the Antiquities  
10 Act "does not authorize even the collection of common or  
11 unimportant fossils by amateur collectors."

12           Beginning in 1977, the Department of the Interior, while  
13 reiterating the long-standing view that fossil regulation had been  
14 deemed to be within the scope of the Antiquities Act, acknowledged  
15 the then-recent decision of United States v. Diaz, 499 F.2d 113  
16 (9th Cir. 1974).<sup>20</sup> Exhibit "I." The Interior Department  
17 "reasserted" its authority to regulate fossils under the then newly  
18 enacted Federal Land Policy and Management Act of 1976 ("FLPMA"),  
19 because it appeared that its previous reliance on the Antiquities  
20 Act may not be supported by the courts.<sup>21</sup> The Interior Department  
21 did continue, however, to rely on FLPMA and the Antiquities Act  
22 with respect to the issue of fossil excavation in, for example,  
23

---

24           <sup>20</sup> The court held that the Antiquities Act was "fatally  
25 vague in violation of the due process clause of the  
26 constitution," in connection with the prosecution for the  
27 theft of face masks which were about four years old.

28           <sup>21</sup> Id. See also Exhibits "J" and "K."

1 a memo dated February 21, 1992.<sup>22</sup> Exhibit "L." And the Interior  
2 Department continues to manage vertebrate fossil resources<sup>23</sup> and to  
3 emphasize that fossils collected under permit "remain the property  
4 of the United States Government."<sup>24</sup>

5 3. The Regulations Of The National Park Service Are  
6 Consistent with Forest Service And BLM

7 Finally, the regulations of the third major Federal land  
8 managing agency, the National Park Service, are consistent with the  
9 Forest Service and the BLM in prohibiting the excavation and  
10 removal of fossil specimens found on its land:

11 (a) Except as otherwise provided in this chapter, the  
12 following is prohibited:

13 (1) Possessing, destroying, injuring, defacing,  
14 removing, digging, or disturbing from its  
15 natural state:

16 \* \* \*

17 (iii) Nonfossilized and fossilized  
18 paleontological specimens, cultural  
19 or archeological resources, or the  
20 parts thereof.

---

21  
22 <sup>22</sup> In that memo, a BLM official stated that fossil permits  
23 would only be issued to "qualified United States institutions and  
24 citizens whose work is undertaken for research or educational  
25 purposes." Exhibit "L." Importantly, any fossils removed from  
26 public land would have to be curated on behalf of the United  
27 States — i.e., such fossils are Government property.

26 <sup>23</sup> See, e.g., Exhibit "A."

27 <sup>24</sup> See, e.g., Exhibit "K" at 3.

1 36 C.F.R. § 2.1(a)(1)(iii).<sup>25</sup>

2 4. Decisions Under 18 U.S.C. §§ 641 and 1361 Are Consistent  
3 With The View That The Fossils Are Property Of The  
4 United States

5 Cases involving the application of criminal law to the  
6 excavation and removal of artifacts from Government property also  
7 support the conclusion that it is unlawful to excavate and remove  
8 fossils, without a permit, from Government land. In United States  
9 v. Jones, 607 F.2d 269 (9th Cir. 1979), the defendant were accused  
10 of digging in Indian ruins located on Government land in the Tonto  
11 National Forest in Arizona. They allegedly excavated and removed  
12 Indian artifacts such as clay pots and human skeletal remains. Id.  
13 at 270.

14 The Ninth Circuit had no difficulty determining that the  
15 artifacts that had been excavated and removed from the national  
16 forest were owned by the Government: "There can be little doubt  
17 that the ruins located in the Tonto National Forest and the relics  
18 found on the ruins are the property of the United States  
19 government." Id. at 272. Accordingly, the defendants were  
20 properly charged with theft of Government property under 18 U.S.C.  
21 § 641 and damage to Government property under 18 U.S.C. § 1361.  
22 Id. at 273.

---

26 <sup>25</sup> The National Park Service's regulatory authority is  
27 based on the National Park Service Organic Act, 16 U.S.C. §§ 1  
28 et seq., which was passed in 1916.

1 Similarly, in United States v. Wade, 1997 WL 543368  
2 (10th Cir. Sept. 3, 1997) (unpublished), the Tenth Circuit upheld  
3 the conviction of a defendant under 18 U.S.C. § 641 who removed  
4 vertebrate fish fossils from Federal land. See Exhibit "M."<sup>26</sup>

5 Finally, in United States v. Larson, 110 F.3d 620 (8th Cir.  
6 1997), the Tenth Circuit affirmed the conviction of a defendant  
7 for retention and retention of stolen government property in  
8 violation of 18 U.S.C. § 641 -- invertebrate fossils from a  
9 national forest. Significantly, the court rejected the defendant's  
10 argument that he had not committed a crime because he had harvested  
11 the fossils before the regulation was promulgated. Id. at 624.<sup>27</sup>  
12 That is, the fossils were Government property before the regulation  
13 was promulgated as well as after.

14  
15  
16  
17  
18  
19  
20  
21  
22  
23 <sup>26</sup> The Tenth Circuit rules permit citation to their  
unpublished decisions when they are of persuasive value.

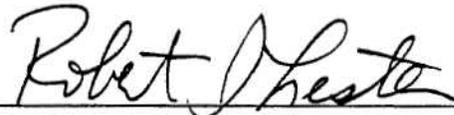
24 <sup>27</sup> Although the 1986 Forest Service regulation does not  
25 prohibit the noncommercial harvesting of invertebrate fossils,  
26 36 C.F.R. § 261.9(i) (1987), there was sufficient evidence  
27 to support the jury's conclusion that the defendant took the  
fossils for a commercial purpose, because the  
defendant was the head of a commercial fossil business, and the  
fossils were stored at the business's warehouse. Id.

CONCLUSION

For the foregoing reasons, plaintiff United States requests the Court to issue a ruling that fossils that are excavated and removed from Federal land, without a permit, are property of the United States.

DATED: September 4, 1998.      Respectfully submitted,

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L97-1-137  
Q =

IN THE DISTRICT COURT OF APPEAL  
FIRST DISTRICT OF FLORIDA

ARTHUR W. COCHRAN,  
Appellant,

CASE NO. 97-3780

vs.

STATE OF FLORIDA,  
Appellee.

ON APPEAL FROM THE CIRCUIT COURT  
OF THE SECOND JUDICIAL CIRCUIT  
IN AND FOR JEFFERSON COUNTY

INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS  
PUBLIC DEFENDER  
SECOND JUDICIAL CIRCUIT

CAROL ANN TURNER  
ASSISTANT PUBLIC DEFENDER  
FLORIDA BAR NO. 243663  
LEON COUNTY COURTHOUSE  
SUITE 401  
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ATTORNEY FOR APPELLANT

DA BA DCA 2  
5/11/98

L97-1-13774 Daniel David  
COCHRAN, ARTHUR WAYNE  
vs. State of Florida  
1st DCA 97-03780

002144

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IN THE DISTRICT COURT OF APPEAL  
FIRST DISTRICT OF FLORIDA

ARTHUR W. COCHRAN,

Appellant,

CASE NO. 97-3780

vs.

STATE OF FLORIDA,

Appellee.

---

I. PRELIMINARY STATEMENT

The appellant, ARTHUR W. COCHRAN, was the defendant below. He will be referred to herein as "appellant" or "Cochran" or collectively with his co-defendant as "the Cochrans." The State of Florida, prosecuting below, will be referred to as "appellee" or "state."

There are two volumes to the record on appeal, both designated "Volume One." The volume containing court records will be referred to by the Roman numeral "I" while the supplemental volume will be referred to by Roman numeral "II," each followed by the applicable page number.

An appendix is attached, containing the testimony of the primary witness for the state. This appendix will be referred to as "App." followed by the applicable page number.

## II. STATEMENT OF THE CASE AND FACTS

The appellant, together with Daniel Chad Cochran, was arrested and charged by information with the unlawful excavation of an archeological site, which is a third-degree felony (II 2). Both men entered into plea agreements, agreeing to plead guilty in exchange to a "stipulated lesser included" of unlawful excavation (I 33) for one year's probation with the special condition to stay out of the Aucilla Management area during probation; to pay \$115 court costs; and to pay restitution in an amount to be determined by the court after a hearing (I 1).

The judgment and sentence of the court still reflects the original charge of unlawful excavation of an archeological site (I 3, 5); but the record makes it clear that, because the disturbed location had not been designated as an archeological site by the State of Florida, the men agreed to a misdemeanor resolution (I 8; 33).

At a restitution hearing conducted after the judgment and sentence, a report prepared by Melissa Memory, an archaeologist with the State of Florida, was admitted into evidence, and she testified. As her testimony is vital to appellant's argument, it is being attached hereto in its entirety as Appendix One.

Ms. Memory testified that Robert Daniels of the Game and

Fish Commission communicated with her, and asked her to document and record damage he believed had been done by the Cochrans. She prepared the report which is included in the record on appeal.

Ms. Memory said she produced two figures: the first figure of \$1,089.30 represents the "actual cost" to the state for her to go out to the site (I 41). The Cochrans stated on the record that they did not object to having that cost assessed against them (I 39).

The second figure of \$28,771.67 represented, according to Ms. Memory, the "archeological value" or "what it would cost if the excavation had been performed by a qualified archaeologist" (I 43). She emphasized that the \$28,771.67 amount was not a damage figure (I 56), but "the value of what it would cost for an excavation" at the site (I 61).

After the hearing, the court determined that the state had proven by a preponderance of the evidence that the "cost of restoration" was \$28,771.67, and assessed that amount against the Cochrans, in addition to the \$1,089.30.

Notice of appeal was timely filed. The Office of the Public Defender, Second Judicial Circuit, was designated to handle the appeal.

### III. SUMMARY OF ARGUMENT

The Cochrans argue against the restitution assessed from three fronts: first, the amount ordered by the court is not reasonable and not founded in fact, but speculative; second, the amount does not represent either restitution or restoration, and is therefore not assessable against the Cochrans; and third, the state has taken the position that restoration is not possible, yet it seeks money for restoration under section 267.13(b), Florida Statutes (1997).

As to the method for determining restitution, the state archaeologist measured the amount of dirt she reasoned had been displaced by the Cochrans; then calculated what it would cost if the state were to displace that much dirt in a scientifically performed excavation.

She never testified that the state had plans for such an excavation: in fact, she testified that knowledge of this particular site and knowledge of looting had been in the state's hands for nearly twenty years, yet the state had not even gone to the trouble to declare the location an archeological site.

The "restitution" figure, while carefully calculated, is totally speculative in the absence of plans to pursue an official excavation, and doesn't bear a reasonable relationship to the

crime.

As to restoration, the archaeologist testified that the figure she provided was not a damage estimate, but represented what it would cost IF the excavation had been performed by a qualified archaeologist to try to restore some of the knowledge and data that was lost on the Cochrans' excavation.

She testified further that the area had undergone a "lot of digging" since the 1980's, and was currently planted in slash pine. She said that the harrowing and digging inherent in farming activities often threw artifacts to the surface, and that "most people find artifacts where farming has occurred."

It would appear that the only true "restoration" which could occur would have to be done by time machine, and the time machine would have to be set for a time some decades before the Cochrans pushed a shovel into the dirt.

Additionally, the artifacts discovered by the Cochrans were left in the hands of the State of Florida. No restitution is owing for them. Therefore, the figure does not represent restoration or restitution.

Finally, the state took the position that the damage was irreparable, that no restoration could be done, that once the men turned a shovel of dirt, all hope of adequate study was gone.

That being the case, it should be a legal impossibility for the Cochrans to have to pay over \$28,000 for that which cannot be done.

This was not a recognized archeological site, although close to one; it is planted in slash pine, suggesting not only agricultural damage during planting but certainly during any harvesting that will occur; the state itself says the damage done by 11 holes cannot be restored, despite the archaeologist's testimony that the site remained valuable after decades of extensive digging; so, the amount demanded of the Cochrans bears no reasonable relationship to the damage done. The state is asking an absurdity: pay to restore that which is not being considered for restoration, and can not be restored.

This matter should be reversed and remanded with directions to vacate the order requiring the Cochrans to pay \$28,771.67 in "restitution/restoration."

Additionally, the Cochrans argue that the statute prosecuted by the state does not comport with the notice standards of due process, and is facially invalid.

#### IV. ISSUES

A. THE COURT ERRED IN ORDERING APPELLANT TO PAY RESTITUTION/RESTORATION COSTS WHERE THE DIGGING DID NOT TAKE PLACE AT A DESIGNATED ARCHEOLOGICAL SITE; WHERE THE COSTS ARE SPECULATIVE; WHERE NO RESTORATION IS CONTEMPLATED; AND WHERE THE COST IS NOT REASONABLE, NOR REASONABLY RELATED TO THE CRIME COMMITTED.

Before argument, the appellant acknowledges the interest the State of Florida has in protecting its past, and honoring the people who have lived here. The appellant has already acknowledged that fact by entering a plea to a lesser included offense in order to dispose properly of this matter. Nonetheless, the appellant argues that reversible error has occurred below in the order of restitution.

Section 775.089, Florida Statutes (1997), provides for restitution as follows:

##### 775.089 Restitution.--

(1) (a) In addition to any punishment, the court shall order the defendant to make restitution to the victim for:

1. Damage or loss caused directly or indirectly by the defendant's offense; and

2. Damage or loss related to the defendant's criminal episode,

unless it finds clear and compelling reasons not to order such restitution. . . .

The same section of the statutes provides that the state's burden regarding restitution is by a preponderance of the evidence.

(7) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating *the amount of the loss sustained by a victim* as a result of the offense is on the state attorney. . . .

Section 775.089(7), Florida Statutes (1997) (e.s.).

In addition, section 267.13(1)(b), Florida Statutes (1997) reads, in pertinent part:

Such person shall forfeit to the state all specimens, objects, and materials collected or excavated, together with all photographs and records relating to such material. The court may also order the defendant to make restitution to the state for damage and the cost of restoring the affected resource as provided in s. 775.089.

These are the two legal bases for ordering restitution. The first relates to damages caused directly or indirectly by the criminal action; the second contemplates both restitution and restoration. The state proceeded under both provisions.

1. Damage or loss caused directly or indirectly by the defendant's offense

Ms. Meadows, testifying for the state, said there has been no formal archaeological investigation done at this location, (App. 50, lines 23-25) although the state was aware of the location and

aware of looting activities taking place over at least two decades, resulting in "a number of . . . substantial holes, looter holes excavated" (App 46; App. 51, lines 20-25; App.52, lines 11-22).

She said some of the holes the Cochrans dug were into holes that had already been dug. When asked if the damage had not already been done by the earlier holes, she responded "Not necessarily" and "No." (App. 54, lines 14-21).

She said she discovered 11 new holes which were directly attributable to the Cochrans' activity on March 31 when they were discovered in the act of shoveling by the game warden; and 21 recent holes which she attributed to the Cochrans, because the holes appeared to her to have been dug in a similar way (App. 61,62). She said she *could* separate the "damage" figures of the 11 new holes and the 21 recent holes, but that would take a new assessment (App. 59).

An obvious question arises: if the earlier holes had not caused damage, why did the new holes cause damage? The witness said the damage was caused because the new digging in the old holes necessarily deepened the hole. This then leads to the conclusion that the new holes which were the same depth as the original old holes did not result in damage. Further, if the

"old" holes did not cause damage, then it follows that the "new" holes and the "recent" holes didn't cause any damage either. The state cannot have it both ways.

A further question arises: Did a preponderance of the evidence sustain a conclusion that the Cochrans were responsible for the 21 "recent" holes in an area which has been known for amateur digs for over two decades? The witness's testimony as to this point is: "the excavation technique, *although it had rained*, there was evidence that *suggested* that these holes had been dug in a very *similar* way and over a very short time period" (App.61-62) (e.s.).

The appellant says a "suggestion" that the 21 "recent" holes were dug by the appellant--which is the state's strongest testimony on this point--doesn't come close to satisfying the state's burden of proving by a preponderance of the evidence that the damage was directly or indirectly caused by the acts of appellant.

2. Damage or loss related to the defendant's criminal episode

The state was all over the map in trying to define damage or loss related to the defendant's criminal episode. The state's witness patiently explained that the plus \$28,000 figure did not

represent damage to the location of the amateur dig. What it represented was what the state would expend if it chose to do an excavation which dislodged an identical amount of soil (App. 43-45).

The witness said there was no way to assess the value of the site without an archaeological excavation (App. 49). The witness's testimony was only to the amount of money it would take to undertake an excavation at the location; not to any damage caused by the appellant (App. 55, lines 8-17).

Again, the State of Florida has had within its sovereign knowledge the existence of a location which attracted amateur diggers for more than two decades. The State of Florida has chosen not to do an excavation to determine the value of this location, and has not gone to the trouble to designate the site a protected archaeological site. Indeed, the witness testified that the State has not even done formal archaeological investigations at the Cow Site, which is a designated archaeological area directly west of the location of the Cochrans' amateur dig (App. 50).

The state has not proven by a preponderance of the evidence that the "damage" figure assessed against the appellant is in any

way related to criminal activity. Nor has the state carried its burden of proving, as required by section 775.089 (7), F.S.

(1997) the amount of the loss sustained by any victim.

To the contrary, all the state has proven is what it would cost if the state had already done its job of assessing the value of a location which it had known about for more than 20 years.

In summary, with regard to restitution under section 775.089, Florida Statutes (1997), the state has failed to prove damages, as that term is commonly understood. The state has failed to prove a relationship between the criminal act and the amount claimed owing in restitution. The state has failed to carry its burden of proving by a preponderance of evidence "*the amount of the loss sustained by a victim as a result of the offense*" (e.s.). Therefore, the provisions of section 775.089, Florida Statutes (1997), have not been satisfied. This court should reverse and remand with directions to strike the requirement for restitution.

3. The cost of restoring the affected resource as provided in s. 775.089.

The state's only witness said the amount she calculated was to cover the cost of an excavation on standardized archaeological units (App.41). With regard to restoration, she said:

Well, my initial assessment was just going in and documenting the damage. It included nothing to restore the site or recover any of the lost data that was destroyed by the illegal excavation. So, I mean, restoration would be--this report does not really address restoration, per se. Because that would be something that you would do to restore the physical properties of the site.

This report addresses what it would cost to restore the knowledge or do a comparable excavation to try to restore some of the knowledge and data that was lost on that excavation.

(App. 45). Again, this is testimony from the same witness who said that the previously dug holes did not necessarily cause damage. (App. 54). And, more basically, it is testimony that says restoration was not a consideration in the figure presented to the court.

The primary case presented by the state at the restitution/restoration hearing was *Glaubius v. State*, 688 So. 2d 913 (Fla 1997). While it is true that in *Glaubius* the Florida Supreme Court authorized investigative costs as restitution (such as the \$1,089.30 which the Cochrans did not object to), the *Glaubius* court also held that such costs must be reasonable, and related to the defendant's actions. Therefore, while the *Glaubius* decision might be pertinent to any review by this court

of the \$1,089.30 assessment for investigation, it is not pertinent with regard to the assessment of "restitution" or "restoration," which are not investigative costs.

Of more interest is the Florida Supreme Court's decision in *J.O.S. v. State*, 689 So. 2d 1061 (Fla. 1997), wherein the court said there must be a *significant* relationship between the acts of the defendant and the restitution sought. And, the court's decision in *Hercule v. State*, 655 So. 2d 1256,1257 (Fla. 1993), which held that, where restitution is a part of a plea bargain [as here], it should be liberally construed in favor of making the victim whole.

There is no significant relationship between the acts of the defendant and the restitution sought. Moreover, even under liberal scrutiny, there is nothing in this record to indicate that the assessed figure is intended to make the victim--the State of Florida--whole. The state has not proven what "whole" might mean, or when it might occur.

In summary, the state has asked for restitution/restoration which is not reasonably related to the appellant's activities; the state has asked the appellant to restore what the state says can't be restored; the state has asked the appellant to pay for

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an "authorized" excavation which might establish the archaeological value of the location, not any damage that the appellant might have caused; the state has asked the appellant to pay for 21 "recent" digs which are not related to the appellant by a preponderance of the evidence;--and all of this on a location planted in slash pine and ignored by the state for decades after the state became aware of the presence of archaeological artifacts.

There is no statutory or case law precedent for the type of punitive damages assessed against the appellant below. This matter should be reversed and remanded, with directions to vacate the order of restitution in the amount of \$28,771.67.

B. SECTION 267.13, FLORIDA STATUTES,  
IS UNCONSTITUTIONAL BECAUSE IT IS  
OVERBROAD AND DOES NOT AFFORD FAIR  
NOTICE AS TO WHAT IS FORBIDDEN UNDER  
THE STATUTE, THUS VIOLATING THE DUE  
PROCESS CLAUSES OF THE UNITED STATES  
AND FLORIDA CONSTITUTIONS.

It is settled law in Florida that a statute may be challenged for overbreadth and a basic denial of due process for the first time on appeal because the statute is facially unconstitutional. See *Trushin v. State*, 425 So. 2d 1126 (Fla. 1982). The Cochrans urge upon this court a conclusion that section 267.13(1)(a), Florida Statutes (1997), is overbroad and facially unconstitutional. That section provides as follows:

Any person who by means other than excavation either conducts archaeological field investigations on, or removes or attempts to remove, or defaces, destroys, or otherwise alters any archaeological site or specimen located upon, any land owned or controlled by the state or within the boundaries of a designated state archaeological landmark or landmark zone, except in the course of activities pursued under the authority of a permit or under procedures relating to accredited institutions granted by the division, commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083, and, in addition, shall forfeit to the state all specimens, objects, and materials collected, together with all photographs and records relating to such material.

One does not have to go very deep into this statute to start

questioning its meaning and application. What does "by means other than excavation" mean? The plain meaning of "excavate," according to the Oxford American Dictionary is to: "1.a. make (a hole or channel) by digging; b. dig out material from (the ground) (soil); 2. reveal or extract by digging; 3. Archaeol. dig systematically into the ground to explore (a site).

Where is the crime? The Cochrans apparently made a hole or a channel, the first definition of "excavate." They may also have revealed or extracted by digging under the second definition of excavate. They may even have been digging systematically into the ground to explore.

Under the statute, these activities are EXCLUDED from criminal prosecution. The statute says it is only a criminal activity if done by means other than excavation. Under the plain meaning of the statute, no crime has yet been committed by the Cochrans because they admitted excavating.

The next phrase is "removes or attempts to remove, or defaces, destroys, or otherwise alters any archaeological site or specimen located upon, any land owned or controlled by the state." One can assume that the word "specimen" is modified by the word "archaeological," but a person of ordinary intelligence would have some difficulty in determining what is and what is not

an archaeological specimen.

Is any relic of former life on this earth an "archaeological specimen?" Does this mean that a camper on St. Joseph Island who digs up an exhausted can of sterno has committed a crime? The sterno can is certainly detritus, and may be of huge interest to some future archaeologist studying the civilization of Twentieth Century North Americans. Does a girlscout who picks up a bone button lodged in the clay at her feet commit a crime if she is standing on state-owned land near Myers Park in Tallahassee? If a scuba diver spots a white bone in the sandy bottom of a creek leading off Wakulla Springs and moves the sand from around it, has he committed a crime? The gardener who rents a plot from Florida A & M University and who finds an arrowhead in the ground around his tomato plants and removes it--is he guilty of a crime under this statute? The answer is "yes" to all of the questions.

What about the word "alters?" Is it not true that the earth beneath our feet is altered by our very tread upon it? One has only to follow a deer path in the woods to know the answer to that question. Are we all, therefore, subject to criminal prosecution under this statute? It would seem so.

Then there is the question of what constitutes "any land owned or controlled by the state or within the boundaries of a

designated state archaeological landmark or landmark zone."

First, how is a person to know what land is owned by the state?

Second, how is a person to know what land is controlled by the state (as opposed to owned)?

How is a person to know the boundaries of "a designated state archaeological landmark or landmark zone?" What is the difference between "a designated state archaeological landmark" and a "landmark zone?" If a person gets out of her car to read a marker by the side of the road, is she at "a designated state archaeological landmark?" Is she within a "landmark zone?" Is not the entire State of Florida a "landmark zone?" Where in Florida can a person safely step or dig a garden? What notice is given a person of ordinary intelligence?

According to section 267.11, Florida Statutes (1997), the only people who receive notice of such designations by the state are the land owners and occupants:

Upon designation of an archaeological site, the owners and occupants of each designated state archaeological landmark or landmark zone shall be given written notification of such designation by the division. Once so designated, no person may conduct field investigation activities without first securing a permit from the division.

Ordinarily, the existence of statutes constitutes adequate

notice of the act prohibited; however, a vague statute may not serve that purpose. The Supreme Court has said that:

Living under a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State commands or forbids.'

*Lanzetta v. New Jersey*, 306 U.S. 451, 458, 83 L.Ed. 888, 890, 59 S.Ct. 618. *Lanzetta* is one of a well-recognized group of cases insisting that the law give fair notice of the offending conduct. [cites omitted]

*Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 31 L.Ed.2d 110, 115 (1972). The statute before this court gives notice to a very narrow class of persons, and is so overbroad as to include virtually every citizen in Florida who ever ventures outdoors. It is overbroad and persons of ordinary intelligence have no notice of criminal activity. The statute is unconstitutional.

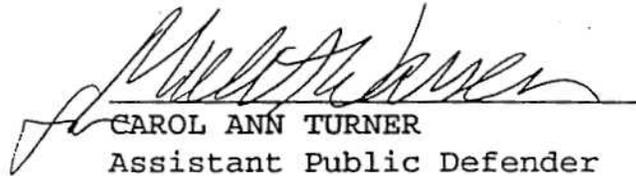
This matter should be reversed with directions to vacate the convictions and vacate any order of restitution entered herein.

V. CONCLUSION

Based on the facts of this case, the Florida Statutes cited, constitutional principles, case law and argument presented, this matter should be reversed and remanded with directions to vacate the convictions and order of restitution in the amount of \$28,771.67.

Respectfully submitted,

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IN THE DISTRICT COURT OF APPEAL  
FIRST DISTRICT OF FLORIDA

ARTHUR W. COCHRAN,

Appellant,

v.

CASE NO. 97-3780

STATE OF FLORIDA,

Appellee.

---

APPENDIX

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002167

IN THE DISTRICT COURT OF APPEAL  
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Appellant,

v.

CASE NO. 97-3780

STATE OF FLORIDA,

Appellee.

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Entire testimony of Melissa Memory (record pages 41-65)	A-1

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1 be about.

2 THE COURT: Would you raise your right hand and  
3 be sworn.

4 (Witness sworn.)

5 Thereupon,

6 MELISSA MEMORY

7 was called as a witness, and having been first duly sworn,  
8 was examined and testified as follows:

9 DIRECT EXAMINATION

10 BY MR. SCHNEIDER:

11 Q Now, will you do me a favor, will you talk loud  
12 enough so Mr. Revell can hear and the judge can hear?

13 A Okay.

14 Q Would you tell us what your name is?

15 A Melissa Memory.

16 Q And how are you employed?

17 A I am an archeologist with the Florida Bureau of  
18 Archeological Research.

19 Q And could you just briefly give us an idea of  
20 your background and training?

21 A I have been employed with the bureau for a year.  
22 I have been doing archeological work since 1987. I have a  
23 bachelor's degree from the University of Georgia in  
24 archeology and a master's degree in anthropology from the  
25 University of Arkansas.

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1 MR. SCHEIDER: I don't have any other questions,  
2 Judge.

3 THE COURT: Thank you. Do you have other  
4 witnesses?

5 MR. SCHEIDER: Judge, I have Mr. Prentice, but I  
6 don't know that -- he would be able to testify as to  
7 the analog in federal. And I don't know that that  
8 would be -- I had him here because she based her  
9 evaluation, in part, on his assistance.

10 But the federal statute is worded differently  
11 than the State statute, so I don't know that that would  
12 assist the court much.

13 THE COURT: Other witnesses?

14 MR. SCHNEIDER: No, sir.

15 THE COURT: Mr. Revell, witnesses?

16 MR. REVELL: No, Your Honor.

17 THE COURT: Okay. Argument.

18 MR. SCHNEIDER: Judge, the statute that's  
19 involved here talks about two different facets, restoration  
20 as well as restitution, as set forth in 775.089.

21 I have provided with Mr. Revell a copy of a  
22 Florida Supreme Court case decided in February of this  
23 year, Glaubius, G-L-A-U-B-I-U-S, versus State, and  
24 Nayer, N-A-Y-E-R, versus State, and Hodge versus State,  
25 all of which are involved in the situation where you

1 Q And back in late March or early April of 1997,  
2 did you have an occasion to be called out to what has been  
3 referred to as the east of Cow site?

4 A Yes.

5 Q In Jefferson County?

6 A Yes.

7 Q And why were you called out to that site?

8 A We were contacted by Officer Robert Daniels of  
9 the Game and Fish Commission requesting our assistance to  
10 document and record archeological damage to the site.

11 Q And there is -- I have a report that I have given  
12 to the court and Mr. Revell that denoted the damage  
13 assessment of the east Cow site dated April 1997.

14 Can you tell me about this document?

15 A Can I get my copy?

16 Q Sure.

17 A Do you want me to just briefly --

18 Q Well, did you complete this document?

19 A Yes.

20 Q And the summary on the first page lists two  
21 monetary figures. Can you tell me what the first monetary  
22 figure is that is denoted, the cost of emergency assessment?

23 A That is the actual cost it cost the State for me  
24 to go out and to do this assessment and prepare this report  
25 and just document the amount of damage that was done.

1 Q Okay. And it looks like about ten pages in there  
2 is a Table 3, and it is titled emergency archeological  
3 assessment and evaluation costs. Take your time.

4 A Yes.

5 Q Now, you have figures in there, it says  
6 "Archeologist I - Memory," that's you?

7 A That's me.

8 Q And you assign a rate of 15.17 per hour. Is that  
9 dollars per hour?

10 A Yes.

11 Q And what does that rate -- what is that?

12 A That is how much I get paid per hour plus the  
13 overhead and insurance sort of things.

14 Q So that's the cost to the State for you to be out  
15 there?

16 A Yes.

17 Q And is that your understanding of what Officer  
18 Daniels' rate per hour is, as well?

19 A Yes, that's what he told me.

20 Q That's what he told you?

21 A Yes.

22 Q And then the number of hours reflected there,  
23 that comes all the way down, is that right?

24 A Yes.

25 Q And then the supplies, they are self-explanatory,

1 right?

2 A Correct.

3 Q And then that's where you totaled the figure of  
4 \$1,089.30, is that correct?

5 A Yes.

6 Q Now, let me go back to the front page and ask you  
7 about the second figure, which is archeological value, and  
8 it denotes \$28,771.67. Can you tell me what that figure  
9 represents?

10 A That figure represents what it would cost if the  
11 excavation had been performed by a qualified archeologist.  
12 As the statute reads, you must -- in order to excavate an  
13 archeological site on state lands you must have a permit.

14 Q First of all, is this a -- is this found, the  
15 breakout, is that Table 4 the cost of archeological  
16 excavation of damaged areas the east of Cow site?

17 A Yes.

18 Q That is the breakout there?

19 A Yes.

20 Q Are those figures using the same figures you used  
21 before on the damage estimate?

22 A Yes.

23 Q Now, with respect to this, is this an estimate of  
24 what it would take to evaluate that site or to work that  
25 site?

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1 A Yes.

2 Q Explain, would you explain that to me, how you  
3 get the estimates of the hours and stuff?

4 A What I did was take the amount of soil that was  
5 illegally excavated, measure the holes, the depth, the  
6 width, the dimensions, and came up with a square meter  
7 estimate of the amount of damage that occurred at the site.

8 And then I took that number and came up with a  
9 research design, if it were to be excavated on standardized  
10 archeological units, which archeologists don't dig at  
11 random, they have a very specific size.

12 Q Is this an extrapolation of the first work that  
13 you did?

14 A Yes.

15 Q Is this an extrapolation that has -- that you  
16 undertook with using the knowledge and experience that you  
17 have in this area?

18 A Yes.

19 Q Now, are you familiar with the Florida Statute  
20 concerning damage to archeological sites?

21 A Yes.

22 Q Section 267.13(b)?

23 A Yes.

24 Q Are we all on the same page on that?

25 A (Indicating affirmatively.)

1 Q ) That statute says restitution and restoration?

2 A (Indicating affirmatively.)

3 Q And this is an area that is one that there has  
4 been digging involved?

5 A (Indicating affirmatively.)

6 Q Now, can you explain restoration in the context  
7 of this site? What does restoration mean?

8 A Well, my initial assessment was just going in and  
9 documenting the damage. It included nothing to restore the  
10 site or recover any of the lost data that was destroyed by  
11 the illegal excavation. So, I mean, restoration would be --  
12 this report does not really address restoration, per se.  
13 Because that would be something that you would do to restore  
14 the physical properties of the site.

15 This report addresses what it would cost to  
16 restore the knowledge or do a comparable excavation to try  
17 to restore some of the knowledge and data that was lost on  
18 that excavation.

19 Q In this sense is the restoration to try to  
20 restore what knowledge there would have been gained from the  
21 site?

22 A Yes.

23 Q Now, let me ask you this. You say damage to the  
24 site as a result of these excavations. Has this site been  
25 impacted by other agricultural or other type uses?

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1 A Yes, it has been. It was planted in pine trees.  
2 And there had been some previous illegal excavations at the  
3 site.

4 THE COURT: I didn't hear you.

5 THE WITNESS: Yes, the area was planted in pine  
6 trees.

7 THE COURT: I heard that.

8 THE WITNESS: And there has been some previous --  
9 several years ago looters holes that the vegetation had  
10 returned.

11 BY MR. SCHNEIDER:

12 Q For your area of archeology, is just filling up  
13 the holes in a situation like this restoration?

14 A No.

15 Q Going back to the pine trees, did the planting of  
16 pine trees in this area, did that eliminate any value or all  
17 value to that archeological site?

18 A No.

19 Q Could you explain that.

20 A Well, in order -- the deposits were deeper than  
21 the impact that had been caused by the planting of the  
22 trees. That's the reason people would go out there and  
23 excavate. I mean, there were artifacts exposed on the  
24 surface, but obviously they were recovering something  
25 beneath the depth of the pine trees. Because there were a

1 number or the substantial holes, looters holes excavated.

2 Q In terms of -- you used the phrase in your report  
3 archeological value, and you associate that phrase with what  
4 you have placed in Table 4 in terms of what it would take to  
5 work that site.

6 Let me ask you this question in conjunction with  
7 those two statements that you have put in. If, for example,  
8 I went out there and I just got a front loader and scooped  
9 everything up and then shifted through and got all of the  
10 little pieces of arrowheads, and pottery, and anything like  
11 that, would that -- and then just filled the hole back up,  
12 would that be restoration?

13 A No. An archeological excavation is not just  
14 recovering the artifacts. It involves careful mapping, note  
15 taking, and documentation of the context in which the  
16 artifacts came from. Such things as house remains, post  
17 holes from the structures that native Americans may have  
18 lived in; pollen samples, what types of things that they  
19 were eating, animal remains, small pieces that people that  
20 aren't looking for those sorts of things just dig right  
21 through and destroy the context.

22 And it is important to maintain that context to  
23 recover the things as they lay in the soil as they were laid  
24 down by native Americans.

25 Q You have stated that the archeological value of

1 this site in terms of what it would cost to work it, does  
2 that reflect the value of the site to the citizens of the  
3 State of Florida?

4 A This would not be the total value. I think in  
5 terms of dollars, you can't put a dollar value, because it  
6 is about history, it is about the information of Florida's  
7 first people. This is all that we have. We don't have  
8 written reports from this time period, this is all that is  
9 left.

10 And the State, through its public land  
11 acquisition program, has made a considerable investment  
12 which explicitly states that preservation of archeological  
13 sites is one of the reasons the State acquired this property  
14 to begin with.

15 Q Did the excavation at this site that you have  
16 documented here, did that destroy the archeological value of  
17 that site?

18 A No.

19 Q Is there some residual value left?

20 A Yes.

21 Q Can you help us with that?

22 A Okay. The site was not completely destroyed.

23 You know, but usually when archeologists excavate a site  
24 they don't dig up the entire site. They dig up enough  
25 minimally to address specific research questions that they

1 have. And over the past couple of years particularly, sort  
2 of conservation has evolved within the archeological  
3 profession which sort of states that you want to impact the  
4 site as least you can while still recovering information.

5 So although there was considerable damage to the  
6 site, there is still an archeological potential left.

7 Q There is some residual archeological value?

8 A Yes.

9 Q Is there any way to assess that archeological  
10 value without doing the site evaluation that you described  
11 in Table 4?

12 A No. In order to assess the site and come up with  
13 its historical, prehistoric context, let's say, and just the  
14 basic information would require archeological excavation.

15 THE COURT: Archeological what?

16 THE WITNESS: Excavations.

17 MR. SCHNEIDER: That's all the questions I have  
18 for this witness, Judge.

19 THE COURT: Mr. Revell.

20 MR. REVELL: Thank you, Your Honor.

21 CROSS EXAMINATION

22 BY MR. REVELL:

23 Q Ms. Memory, you went out to the site with Officer  
24 Daniels?

25 A Yes.

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1 Q And this was back on -- I think Officer Daniels  
2 made this case on March 31st. You probably went out there a  
3 day or two after that, is that correct?

4 A Yes.

5 Q And did Officer Daniels give you an initial  
6 report of what he found when he went to the site and located  
7 these two young men there?

8 A Not until a later date, a copy of the report.  
9 But he verbally went through a sequence of events.

10 Q And did he tell you that when he got to the site,  
11 this was made available to you, I'm sure, that he found  
12 these two young men there with a shovel apiece, basically?

13 A Yes.

14 Q And did you make the report or the little diagram  
15 in this report showing new digging, recent diggings? Is  
16 that what you did, or is that what Officer Daniels did?

17 A Yes, I did.

18 Q I didn't know.

19 A Yes.

20 Q And this is at the east of Cow site?

21 A Yes.

22 Q Or the Cow site?

23 A The east of Cow site. Because I should --  
24 because there hasn't been really formal archeological  
25 investigations done at the Cow site or at this site, the

1 site delineation has not been well-established. Probably  
2 -- there is a possibility, and it is very probable that this  
3 site would continue on into the recorded Cow Creek site.

4 Q And let's just clarify this. This site that  
5 Officer Daniels found these two young men in was not a  
6 archeological site as defined by the State, I will let you  
7 tell us what that means, but it was not a site at that time?

8 A Yes, it was a site.

9 Q It was a recorded site?

10 A It was not recorded, but an archeological site as  
11 defined by the State does not have to be a recorded site.

12 Q And there was no -- there had been no prior  
13 investigative work to determine the value of this site --

14 A No.

15 Q -- prior to this case being made against these  
16 two young men?

17 A Correct.

18 Q So let's go into a little bit about what you  
19 talked about in this report concerning the fact that there  
20 has been -- there has been a large amount of what you call  
21 looting, digging at this site before these young men were  
22 there that day, is that correct?

23 A Just from my observations at that time. But like  
24 you said, there have been no prior investigations of this  
25 site, so --

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1 Q Well, you made reference, and I'm going to --  
2 you've got a copy there, don't you?

3 A Yes.

4 Q On page -- the pages are not numbered, I  
5 apologize. It looks like Page 3, the bottom of your report,  
6 you are making reference to the Cow Creek site and then the  
7 east of Cow Creek site and you say, in the last sentence,  
8 however, he updated the file in July of '89, noting that  
9 during the six-month period which had followed his original  
10 site reporting, the looting activity had doubled.

11 Many large holes associated with prior  
12 disturbances observed at the east of Cow site, the site we  
13 are talking about here today, likely dated to this period of  
14 illegal digging.

15 So, ma'am, what I'm trying to find out is, it  
16 looks like to me there has been a large amount of digging at  
17 this site through the '80s --

18 A Yes.

19 Q Even in the '90s, of course?

20 A Possibly in the '90s.

21 Q How about in the '70s?

22 A Possibly. It's hard to date.

23 Q And there has been no investigation done to see  
24 what the damage to this site was for all of that damage. Do  
25 you understand my question?

1 A Correct.

2 Q So can you place a value on that -- a money  
3 figure on that amount of damage?

4 A If I were to go conduct a similar investigation  
5 for those illegal digging, yes.

6 Q And would that figure likely include a majority  
7 of the damage that you assessed for these young mean on  
8 these two shovels that they were out there caught with?

9 A No. The cost estimate of \$28,000 is based solely  
10 on the excavations that were dug by these -- we determined  
11 to have been dug by these two.

12 Q So you are saying that the \$28,000 is for -- did  
13 they find any major artifacts that you know of, according to  
14 Officer Daniels? Did they disturb any major artifacts or  
15 anything of any significant archeological value as far as  
16 you know?

17 A Yes. The site itself, the archeological value is  
18 not the artifacts. The archeological context, the  
19 scientific and historical importance of the site.

20 Q Okay. And you are saying that the \$28,000 is  
21 strictly from what these two boys did in a couple of hours  
22 with two shovels?

23 A Yes.

24 Q Now, how do you determine the difference in the  
25 site that the damage that was done -- say, as you mentioned

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1 here in the '80s, there were large holes right in the areas  
2 and in the holes -- they went into holes that were already  
3 dug into?

4 A In some cases. In some cases there were holes  
5 that were not previously excavated.

6 Q Correct. And some were?

7 A (Indicating affirmatively.)

8 Q So, ma'am, I just don't see how you can separate  
9 the damage when these young men are digging into holes that  
10 were already dug into previously?

11 A Well, I just measured the holes that had fresh  
12 shovel scars, that had fresh soil footprints and other  
13 evidence that indicated that these were holes.

14 Q But if they dug into holes that had already been  
15 done, okay, the damage is done, is it not?

16 A Not necessarily. Obviously there were still  
17 artifacts in place underneath these other holes.

18 Q I'm not going to press the point with you, but  
19 obviously if the damage is done, the hole is made, okay,  
20 isn't the damage done?

21 A No.

22 Q It has been disturbed?

23 A In some cases. But there were holes and they  
24 were digging adjacent and in holes, but deeper than the  
25 original disturbance.

1 Q Did you separate any, or did you assess any  
2 damage or any of this financial figure that you have  
3 mentioned, those \$28,000 for the digging that you found that  
4 was done prior to these young men?

5 A No. I specifically calculated the holes that  
6 were freshly dug, that had fresh soil versus -- and I didn't  
7 even measure --

8 Q So you gave no value, or no damage value to any  
9 of the previous digging done at this site that was not done  
10 by these two men?

11 A No.

12 Q And this \$28,000 figure that, and some change, is  
13 simply a figure -- it is not a damage figure for these two  
14 young men, it is the amount that you found it would cost to  
15 go in and do an actual excavation at this site?

16 A Yes. Based on the exact amount, or as close to  
17 the amount of soil that they excavated.

18 Q And a lot of this financial amount that you have  
19 mentioned, if you went in and did this excavation at this  
20 site by experts, a large amount of this \$28,000 would be  
21 spent anyway just to do the excavation. If you had done it  
22 in 1989, or 1992, to do an excavation at this site, would it  
23 not cost approximately that same amount then?

24 A Well, it depends on what research design you were  
25 to follow. This was -- if we were to go excavate a

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1 comparable amount of material that these, we determined  
2 these two to have excavated, that is how much it would cost.

3 Q Would you agree with me that to do an excavation  
4 at this site in 1992 would cost roughly very close, maybe we  
5 have some inflation involved here, but would cost very  
6 closely to the assessment of this \$28,000 figure that you  
7 have?

8 A If we were to go in and excavate a similar amount  
9 of soil.

10 Q At this site?

11 A At this site.

12 Q It would be very close to the same figure to do  
13 the excavation?

14 A That would be a standard -- there is a standard  
15 that we would follow.

16 Q Ma'am, have you ever witnessed -- there has been,  
17 you said that this entire east of Cow Creek site had been  
18 farmed?

19 A Yes.

20 Q And that was by the planting, I think you noted  
21 as far as slash pine planting?

22 A Uh-huh.

23 Q Have you ever witnessed what is done for slash  
24 pines to be planted --

25 A Yes.

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1 Q -- by a large farmer?

2 A Yes, I worked for the Forest Service.

3 Q You have seen the harrows and the equipment  
4 that's used to do that?

5 A Yes.

6 Q Okay. So this site you would also have to report  
7 was completely farmed, harrowed, dug up. And I don't know  
8 if you know when that was, but you note that it did occur?

9 A Yes.

10 Q And you have witnessed that kind of equipment and  
11 what it does to the soil?

12 A Yes.

13 Q Would you admit to me, ma'am, that that would  
14 certainly have disturbed this site?

15 A Certainly it has disturbed the site.

16 Q And would that have caused there to be a large  
17 number of artifacts that would have been disturbed, pushed  
18 to the top, people who had come through and picked them up  
19 because of that?

20 A Yes.

21 Q In fact, that's probably how most people find  
22 artifacts, isn't it, walking through the woods where there  
23 has been farming and they have been --

24 A Yes.

25 Q One point I don't know if Mr. Schneider brought

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1 up, when you talked to Officer Daniels, he didn't allow  
2 these two young men to take any -- remove anything from the  
3 site on the day he caught them, did he?

4 A No.

5 Q So if there was anything there -- did he tell you  
6 whether he witnessed or he saw any artifacts on the ground  
7 or anywhere around there when he got there?

8 A He said he received -- he showed me three  
9 prehistoric stone tools as well as some ceramics, I can't  
10 remember exactly what, because he took that as evidence.

11 Q He took it?

12 A Yes.

13 Q And the figure that you came up with here, did  
14 you include -- I'm going back to your map that you did where  
15 you mentioned "N" for new site damage and "R" for recent, I  
16 hope I'm saying that right.

17 A Yes.

18 Q Did you assess damage in this \$28,000 for the R?

19 A Yes.

20 Q So you included that?

21 A Yes.

22 Q And just so the court will understand, that was  
23 for digging that Officer Daniels noted was not done on the  
24 date he came up there and found the Cochrans there?

25 A Yes. Although he stated that --

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1 Q If you would, just answer my question. So that  
2 damage, the R damage that you included in this \$28,000, was  
3 damage not done on the date that this case was made against  
4 the two Cochrans?

5 A No.

6 Q And the Cochrans were charged with this offense,  
7 for the damage that they did, I believe that was March 31st?

8 A Yes.

9 Q And the R damage that you noted was not done on  
10 March 31st?

11 A No, but --

12 Q If you would, just answer my question. No?

13 A No.

14 Q Can you separate those two figures, the R damage  
15 and the N damage?

16 A Yes, it would be possible.

17 Q Do you have that figure for us today?

18 A No. That would require another assessment.

19 Q Let's don't have another one, please.

20 Ma'am, I'm not trying to belabor the point, this  
21 will wind me up. If you had gone to this site on March the  
22 29th, 1997, and you had been asked to give this figure, to  
23 assign a value, a dollar value to this site for the damage  
24 done to this site at that time that you found, can you give  
25 me an idea of a dollar figure that would be?

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1           A       No. This is not the value of the site. This is  
2 the value of what it would cost for an --

3           Q       An excavation.

4           A       -- for an excavation.

5           Q       By an expert.

6           A       By an expert of the amount of soil that was  
7 excavated.

8           Q       Of that east Cow site?

9           A       Of the new and recently -- the 29th. On the 29th  
10 probably a lot of the recent holes may have been excavated  
11 at that time, because they appeared to have been done over  
12 the same weekend period.

13                   MR. DAVIS: No further questions at this time.

14                   MR. SCHNEIDER: Your Honor, first of all, I  
15 neglected to -- even though this is a copy, I would ask  
16 to move this into evidence as State's Exhibit 1, the  
17 report.

18                   THE COURT: All right. Without objection, it  
19 will be admitted.

20                   (State's Exhibit 1 received into evidence.)

21                   MR. SCHEIDER: Thank you, Judge.

22                                   REDIRECT EXAMINATION

23 BY MR. SCHNEIDER:

24           Q       Ms. Memory, let me go back to something. Is Mr.  
25 Guy Prentice (phonetic) here?

1 A Yes.

2 Q And do you know with whom he works?

3 A He works for the National Park Service.

4 Q Did you consult him concerning the preparation of  
5 this report and the damage assessments?

6 A Yes.

7 Q And are you aware or are you familiar if there is  
8 a federal analog to this Florida Statute?

9 A Yes, there is.

10 Q All right. And is Mr. Prentice familiar with  
11 similar type assessments on federal lands?

12 A Yes.

13 Q And did you consult with him in arriving at these  
14 figures here?

15 A Yes.

16 Q The procedures?

17 A The procedures, yes.

18 Q Now, Mr. Revell has been asking you a lot of  
19 questions about damages. We are not talking about damages  
20 here, are we?

21 A Well, we are talking about --

22 Q I know we are talking about damage in terms of  
23 injury. Are we talking about what is the difference in the  
24 fair market value of the site before the digging and after  
25 the digging?

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1 A I don't understand that question.

2 Q If your car was run into, you would get an  
3 estimate of the damages and you would get it fixed.

4 A Right.

5 Q Can you just take ten shovels full of dirt and  
6 fill up these holes and it would be fixed?

7 A No.

8 Q Okay. So there is a difference between that kind  
9 of damage and the assessment that you made here?

10 A (Indicating affirmatively.)

11 Q Mr. Revell wouldn't let you answer about your  
12 discussions with Mr. Daniels. Why did you include what he  
13 calls the N sites and the R sites both in this evaluation?

14 MR. REVELL: Your Honor, I'm going to object to  
15 that. If Officer Daniels can come testify about that,  
16 that's fine, but I don't think she should be allowed to  
17 testify about that.

18 MR. SCHNEIDER: I didn't ask for hearsay. I  
19 asked for why she included it.

20 THE COURT: Objection overruled.

21 BY MR. SCHNEIDER:

22 Q Can you tell me why you included both sites as  
23 designated R and N?

24 A Well, as discussed in my report, there was  
25 physical evidence that the shovel, the excavation technique,

1 although it had rained, there was evidence that suggested  
2 that these holes had been dug in a very similar way and over  
3 a very short time period.

4 Q So you felt like it was appropriate to put those  
5 in the same context?

6 A Yes.

7 Q As an archeologist, you find an artifact here, do  
8 you evaluate in the context of where you find it and the  
9 strata in which you find it, and all of that?

10 A Yes.

11 Q Is that similar to what you did here with the R  
12 sites versus the N sites?

13 A Yes.

14 Q In terms of -- you evaluated the site when you  
15 got there, is that correct?

16 A Yes.

17 Q And then you did an archeological value, is that  
18 correct?

19 A Yes.

20 Q And did you do that archeological value in  
21 conjunction with the Section 267.13(b) that you set forth in  
22 your report?

23 A Yes.

24 Q Does that come under the rubric of restoration?

25 A Yes.

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1 MR. SCHEIDER: I don't have any other questions,  
2 Judge.

3 THE COURT: Thank you. Do you have other  
4 witnesses?

5 MR. SCHEIDER: Judge, I have Mr. Prentice, but I  
6 don't know that -- he would be able to testify as to  
7 the analog in federal. And I don't know that that  
8 would be -- I had him here because she based her  
9 evaluation, in part, on his assistance.

10 But the federal statute is worded differently  
11 than the State statute, so I don't know that that would  
12 assist the court much.

13 THE COURT: Other witnesses?

14 MR. SCHNEIDER: No, sir.

15 THE COURT: Mr. Revell, witnesses?

16 MR. REVELL: No, Your Honor.

17 THE COURT: Okay. Argument.

18 MR. SCHNEIDER: Judge, the statute that's  
19 involved here talks about two different facets, restoratic  
20 as well as restitution, as set forth in 775.089.

21 I have provided with Mr. Revell a copy of a  
22 Florida Supreme Court case decided in February of this  
23 year, Glaubius, G-L-A-U-B-I-U-S, versus State, and  
24 Nayer, N-A-Y-E-R, versus State, and Hodge versus State,  
25 all of which are involved in the situation where you

7/13/98

L97-1-13774

IN THE DISTRICT COURT OF APPEAL  
FIRST DISTRICT OF FLORIDA

RECEIVED

AUG 30 1999

Office of General Counsel  
Department of State

ARTHUR WAYNE COCHRAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 97-03780

ON APPEAL FROM THE CIRCUIT COURT  
OF THE SECOND JUDICIAL CIRCUIT,  
IN AND FOR JEFFERSON COUNTY, FLORIDA

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1st DCA 97-03780

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PRELIMINARY STATEMENT

Appellant, Arthur Wayne Cochran, was the defendant in the trial court; this brief will refer to Appellant as such, Defendant, or by proper name. Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State.

The record on appeal consists of two volumes, one of original record, and one supplemental volume. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to the original volume by use of the symbol "I" followed by any appropriate page number within the volume. The same protocol will be used for the Supplemental Record through use of the symbol "SR." "IB" will designate Appellant's Initial Brief, followed by any appropriate page number.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Appellee finds appellant's statement of the case and facts, where relevant to the issues presented on appeal, to be generally supported by the record.

SUMMARY OF ARGUMENT

*Issue One.* The trial court did not err in fixing the restitution amount in this case. To recoup a similar amount of archaeological knowledge lost as a result of appellant's digging, it would cost the State \$28,771.67. The trial court thus did not abuse its discretion in setting restitution in this amount.

*Issue Two.* Appellee asserts this issue is procedurally barred. Even if this Honorable Court conclude to the contrary, appellant fails on the merits for the simple reason that he argues constitutional vagueness as to a statutory section **he was not** charged under.

ARGUMENT

ISSUE I

DID THE TRIAL COURT REVERSIBLY ERR IN FIXING THE AMOUNT OF RESTITUTION IN THIS CASE? (Restated)

*Standard of Review*

A trial court's determination of the amount of restitution owed a victim will not be reversed on appeal "absent a clear showing the trial court abused its discretion." Herbert v. State, 614 So.2d 493, 494 (Fla. 1993).

*Merits*

A point relative to what is not contested in this appeal is in order. It cost the State \$1,089.30 for an emergency archaeological survey to assess the impact of appellant's digging. Appellant at trial stated: "...we do not object to the restitution amount of the \$1089.30. That is the cost to go out to the site, and we think the State was entitled to see that as restitution, Your Honor." (I-40).

Thus, the only amount at issue is \$28,771.67, which is what it would cost the state to have done a proper archeological investigation at the locations appellant looted. (I-18). Though appellant on this appeal endeavors to intimate that he and his brother (who were caught red handed digging) are not responsible for all of the holes listed in the archeologist's report (IB, pp. 9-10), the arrest report contains this of note on that point: "Ask subjects about previous pot-holes at site (within 2 weeks) and

subjects admit to digging at the site previously and responsible for all holes." (SR-4).

The \$28,771.67 restitution figure represents what it would cost to try to recoup the historical knowledge lost as a result of the digging of the brothers Cochran. The archaeologist made this clear in her testimony:

This report addresses what it would cost to restore the knowledge or do a comparable excavation to try to restore some of the knowledge and data that was lost on that excavation.

Q. In this sense is the restoration to try to restore what knowledge there would have been gained from the site?

A. Yes.  
(I-46-47)

Merely filling in the holes with dirt and leveling them off is not restoration. (I-47). What has been lost is not the value of some arrowheads, but the archaeological knowledge provided by how the artifacts lay in relation to other elements *in situ*. The archaeologist explained:

An archeological excavation is not just recovering the artifacts. It involves careful mapping, note taking, and documentation of the context in which the artifacts came from. Such things as house remains, post holes from the structures that native Americans may have lived in; pollen samples, what types of things that they were eating, animal remains, small pieces that people that aren't looking for those sorts of things just did right through and destroy the context.

And it is important to maintain that context to recover the things as they lay in the soil as they were laid down by the native Americans.  
(I-48)

Appellant's argument is basically all he and his brother the co-defendant did was dig a bunch of holes and try to make off with some artifacts. Further, his restitution liability should be zero because it cannot be ascertained, in his view, what the value was of what he destroyed<sup>1</sup>. Apparently, in appellant's view, his restitution obligation should be capped at what it would cost to fill in the holes and smooth them off, plus the cost of the archaeologist's emergency survey.

It sounds as if appellant is stating, for example, "All I did was destroy a computer floppy disk. The value of that is \$1. Therefore, that is the extent of my restitution liability." What needs to be recompensed as well is the value of the knowledge contained on that destroyed floppy disk. If it costs \$1,089.30 for an emergency survey to assess what knowledge appellant has destroyed by destroying the disk, that is fair and just restitution, which appellant so concedes. If it would cost \$28,771.67 to do the scientific study, the results of which were lost when the disk containing them was destroyed by the appellants, it is fair and just restitution as well.

The concept of restitution is not just limited to replacing property damaged or destroyed by criminal activity, although that is the context it most often arises in. It is reasonable for an

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<sup>1</sup>In appellant's view, he would apparently have no restitution obligation if he sliced up the Mona Lisa into tatters. Because what he destroyed, is, in the literal sense, priceless, he has no restitution to pay because no price can be placed on what he ruined.

employee to have to pay restitution for the investigative expenses of his employer to substantiate he is stealing from the business. Glaubius v. State, 688 So.2d 913 (Fla. 1997. If the costs of such an in-house criminal investigation in Glaubius, utilizing surveillance equipment, review of sales records and detective work by loss prevention employees "is causally connected to the offense and bears a significant relationship to the offense," 688 So.2d at 915, then the same conclusion must be reached here. But for appellant's digging, the state would not have lost the archaeological knowledge appellant destroyed<sup>2</sup>.

What appellant destroyed cannot be replaced. What can be replaced is the acquisition of a like amount of archaeological knowledge. The price tag to acquire knowledge in a like amount destroyed by appellant's dig is \$28,771.67.

The Supreme Court stated in Glaubius, at 915:

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<sup>2</sup>The Supreme Court in Glaubius, while holding that investigative costs to uncover an employee's thefts bear a significant relationship to the crime and thus warrant restitution, ordered that remand be held in that case to determine fairly what investigative costs were incurred. 688 So.2d at 916. Simply put, the proponent of proof in Glaubius fell down on the job in establishing the amount of restitution due: "The regional manager referenced no records in estimating the time spent on this case, admitted that the hourly rate was arbitrary, and acknowledged that he was a salaried employee for which Beall's expended no additional salary costs as a result of Glaubius' offense." Id. In contrast here, the evidence establishing the \$28,771.67 restitution amount here is exhaustive. The archaeologist's report includes *inter alia*, site maps, photographs, salaries for state employees at precise rates, consultations with federal employees in like positions who had experienced similar cases on federal lands, and references to learned treatises in the field. See generally I-6-27.

We have previously determined that the purpose of restitution is two-fold: It acts to (1) compensate the victim and (2) serve the rehabilitative, deterrent, and retributive goals of the criminal justice system. *Spivey v. State*, 531 So.2d 965 (Fla. 1988). The trial court is in the best position to determine how imposing restitution may best serve those goals in each case. *Id.* at 967. Moreover, the trial court has discretion to take into account any appropriate factor in arriving at a fair amount which will adequately compensate a victim for his or her loss and further the purposes of restitution. *State v. Hawthorne*, 573 So.2d 330 (Fla. 1991).

The trial court here, after hearing the testimony of the archaeologist, determined that the \$28,771.67 figure represented an appropriate amount for costs of restoration. (I-71). Such ruling does not constitute an abuse of discretion.

## ISSUE II

IS THIS ISSUE PRESERVED FOR APPELLATE REVIEW, AND, IF SO, HAS APPELLANT ESTABLISHED THE STATUTE IS CONSTITUTIONALLY INFIRM FROM A VAGUENESS STANDPOINT? (Restated)

### **Standard of Review**

A statute is "presumed to be constitutional, and the burden rests on appellant to establish the contrary." Frear v. State, 700 So.2d 465, 466 (Fla. 1st DCA 1997) citing Lick, infra.

State v. Lick, 390 So.2d 52, 53 (Fla. 1980):

Legislative enactments are presumed to be constitutional. Cilento v. State, 377 So.2d 663 (Fla.1979). This Court's obligation is to resolve all doubts as to the validity of a statute in favor of its constitutionality. State v. Cormier, 375 So.2d 852 (Fla.1979). Thus, even where the statute is reasonably susceptible of two interpretations, one of which would render it invalid and the other valid, we must adopt the constitutional construction. See Florida State Board of Architecture v. Wasserman, 377 So.2d 653 (Fla.1979).

### **Procedural Bar**

The record in this case affirmatively demonstrates that appellant here pled to a stipulated lesser charge. It is further beyond contravention appellant filed no motion attacking the statute on any basis, reserved no such issue in his plea, never cited such claim in the Statement of Judicial Acts to be reviewed.

Appellant cannot raise a vagueness constitutionality claim for the first time on appeal<sup>3</sup>. Bush v. State, 682 So.2d 85, 88 (Fla.

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<sup>3</sup>But see contra Wilburn v. State, 23 Fla. L. Weekly D1544 (Fla. 4th DCA June 24, 1997) permitting facial void for vagueness

1996) (in context of CCP instruction in murder trial), citing, *inter alia*, Crump v. State, 654 So.2d 545, 548 (Fla.1995), which stated:

Claims that the CCP instruction is unconstitutionally vague are procedurally barred unless a specific objection is made at trial and pursued on appeal. ... Crump's objection at his 1989 trial to the CCP issue concerned the constitutionality of this aggravating factor and whether CCP applied to Crump's case. Although Crump argued on direct appeal that the instruction was unconstitutionally vague, the issue is procedurally barred because Crump did not submit a limiting instruction or object to the instruction as worded at trial.

Bush further cited to Archer v. State, 673 So.2d 17, 19 (Fla.1996) ("Claims that the instruction on the cold, calculated, and premeditated aggravator is unconstitutionally vague are procedurally barred unless the defendant both makes a specific objection or proposes an alternative instruction at trial and raises the issue on appeal."), *cert. denied*, --- U.S. ----, 117 S.Ct. 197, 136 L.Ed.2d 134 (1996).

See also Chapter 924, Fla. Stat. (1996 Supp); State v. Barber, 301 So.2d 7, 9 (Fla. 1974): "An appellate court must confine itself to a review of only those questions which were before the trial court and upon which a ruling adverse to the appealing party was made."

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challenge for first time on appeal to statute prohibiting sexual battery of a mentally defective person.

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*Merits*

Appellee submits this issue is procedurally barred, supra. Should this court disagree with this conclusion, then, on the merits, appellant's claim must fail nonetheless. Appellant launches into a long analysis, urging "upon this court a conclusion that section 267.13(1)(a), Florida Statutes (1997), is overbroad and facially unconstitutional." (IB, p. 16).

If that were the statute he was charged under, appellant's argument might have not inconsiderable persuasive force. Unfortunately for appellant, he was not charged under §267.13(1)(a). He was charged under §267.13(1)(b)<sup>4</sup>. Section 267.13(1)(b) prohibits disturbance of an archeological site "by means of excavation." Appellant here explicitly admits excavation: "The Cochrans apparently made a hole or channel, the first definition of 'excavate.'" (IB, p. 17).

It is well settled that one whose conduct falls squarely within the conduct the statute prohibits cannot claim vagueness. Wilburn at D1544, citing, *inter alia*, State v. Kahles, 644 So.2d 512, (Fla. 4th DCA 1994), approved, 657 So.2d 896 (Fla. 1995):

A plaintiff who engages in some conduct that it clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.

This analysis is grounded upon Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 102 S.Ct. 1186

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<sup>4</sup>see Information at SR-2.

(1982). The Florida Supreme Court in Bouters v. State, 659 235, 237 (Fla. 1995) stated that when the constitutionality of a statute is challenged on overbreadth and vagueness grounds, "The procedure for analyzing such a challenge is set forth by the United States Supreme Court in Village of Hoffman Estates..." Hoffman Estates provides, citing to Parker v. Levy, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974) that "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." (cited in Wilburn at D1544).

See also State v. Barnes, 686 So.2d 633, 637 (Fla. 2d DCA 1996), rev. den. 695 So.2d 698 (Fla.) and cert. den. \_\_\_ U.S. \_\_\_, 118 S.Ct. 257 (1997): "If the record demonstrates that the appell[ant] engaged in some conduct clearly proscribed by the plain and ordinary meaning of the statute, then [s]he cannot successfully challenge it for vagueness nor complain of its vagueness as applied to the hypothetical conduct of others." (cited in Wilburn at id.)<sup>5</sup>

Being incapable of raising a vagueness challenge, since his conduct falls squarely within what the statute proscribes, and since his argument is geared to a section he was not charged under, this court should utilize the well settled presumptions that acts of the Legislature are constitutional, and interpretations of same which uphold constitutionality are preferred. Thus, this court should uphold the constitutionality of the challenged statute.

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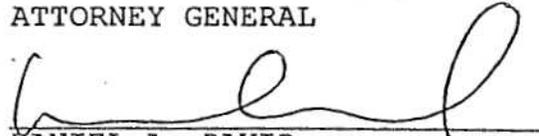
<sup>5</sup>This point directly ruptures the other varied musings of appellant in this argument, such as discarded Sterno cans, gardener's plots, etc, etc. Appellant here dug up the place, and carted off the artifacts, knowing it was illegal. (SR-4-5)

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Appellant's judgment and sentence entered in this case.

Respectfully submitted,

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[AGO# L97-1-13774]

Arthur Wayne COCHRAN and Daniel  
Chad Cochran, Appellants,

v.

STATE of Florida, Appellee.

Nos. 97-3780, 97-4031.

District Court of Appeal of Florida,  
First District.

Jan. 15, 1999.

An appeal from the Circuit Court for  
Jefferson County. F.E. Steinmeyer, III,  
Judge.

\*190 Nancy A. Daniels, Public Defender;  
Carol Ann Turner, Assistant Public Defender,  
Tallahassee, for Appellants.

Robert A. Butterworth, Attorney General;  
Daniel A. David, Assistant Attorney General,  
Tallahassee, for Appellee.

PER CURIAM.

In these two consolidated direct criminal  
appeals, we reverse the restitution order,  
which directed appellants, jointly and  
severally, to pay \$29,860.97 to the State of  
Florida, and remand with directions that the  
trial court enter an amended order directing  
appellants to pay \$1,089.30 in restitution.  
See *Glaubius v. State*, 688 So.2d 913  
(Fla.1997) (the loss or damage which may be  
compensated for by restitution must be either  
directly or indirectly related to the defendant's  
offense). In all other respects, we affirm.

AFFIRMED IN PART; REVERSED IN  
PART; and REMANDED, with directions.

ALLEN, WEBSTER and BROWNING, JJ.,  
Concur.

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