

District Court of Appeal of Florida,  
First District.

Mary Lynette SHEARER, Appellant,  
v.  
STATE of Florida, Appellee.

No. 1D99-270.

April 17, 2000.

Defendant was convicted in the Circuit Court, Jefferson County, F.E. Steinmeyer, III, J., of unlawful excavation of an archaeological site without a permit. Defendant appealed. The District Court of Appeal, Browning, J., held that: (1) acting willfully and knowingly is an element of the crime of unlawful excavation of an archaeological site without a permit, and (2) failure to give requested instruction on scienter required reversal.

Reversed and remanded.

West Headnotes

[1] Health and Environment ☞25.5(8)  
199k25.5(8)

Acting willfully and knowingly is an element of the crime of unlawful excavation of an archaeological site without a permit; the statute discloses no express or implied legislative intent or mandate to omit the requirement of mens rea. West's F.S.A. § 267.13(1)(b).

[2] Criminal Law ☞1152(1)  
110k1152(1)

A trial court's ruling on whether to give a specially requested jury instruction is reviewed under an "abuse of discretion" standard.

[3] Criminal Law ☞822(1)  
110k822(1)

A judgment will not be reversed for failure to give a particular jury charge where, overall, the instructions given are clear, comprehensive, and correct.

[4] Criminal Law ☞1173.2(2)

110k1173.2(2)

In appropriate circumstances, the failure to instruct the jury that criminal intent, or mens rea, is an essential and indispensable component of the charged crime that must be established constitutes reversible error.

[5] Criminal Law ☞21  
110k21

As the legislature is vested with the authority to define the elements of a crime, determining whether scienter is an essential element of a statutory crime is a question of legislative intent.

[6] Criminal Law ☞21  
110k21

Because offenses requiring no mens rea generally are not favored, some indicia of legislative intent--be it express or implied--is necessary to eliminate mens rea as an element of a crime.

[7] Criminal Law ☞1173.2(2)  
110k1173.2(2)

Failure to give requested instruction that acting willfully and knowingly was an element of the crime of unlawful excavation of an archaeological site without a permit was not harmless; the defendant testified that she believed that she was on private land, and absent the instruction on scienter, the jury could have found the defendant guilty even without a finding that she knew that she was excavating on land owned or controlled by the state or within the boundaries of a designated state archaeological landmark or landmark zone. West's F.S.A. § 267.13(1)(b).

\*193 Brian T. Hayes, Monticello, for Appellant.

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

BROWNING, J.

Mary Lynette Shearer (Appellant) appeals her conviction and sentence for the unlawful excavation of an archaeological site without a permit, a violation of section 267.13(1)(b), Florida Statutes

(1997). Appellant contends that the trial court erred, as a matter of law, both by refusing to give a requested special jury instruction relating to an essential element of the charged offense and by ordering her to pay restitution for damages not incurred by Appellee, the State of Florida. Having concluded that the lower tribunal's failure to give the requested instruction constituted prejudicial error, we reverse the conviction and sentence and remand for a new trial. § 924.051(3), Florida Statutes (1997).

[1] In its amended information, the State alleged that on May 17, 1997, Appellant had "unlawfully, by means of excavation, either conducted an archaeological field investigation on, or removed or attempted to remove, or defaced, destroyed \*194 or otherwise altered an archaeological site or specimen located upon Burnt Out Mounds, Aucilla Wildlife Management Area, land owned or controlled by the State, without permit." The applicable statute under which Appellant was charged states, in pertinent part:

Any person who by means of 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 felony of the third degree.... 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.

§ 267.13(1)(b), Fla. Stat. (1997). A felony of the third degree is punishable "by a term of imprisonment not exceeding 5 years." § 775.082(3)(d), Florida Statutes (1997). After adjudicating Appellant guilty in accordance with the jury's verdict, the trial court placed her on 5 years' probation, imposed 100 hours' community service, and set restitution in the amount of \$35,079.35. The court also required Appellant to spend 10 consecutive weekends in the Jefferson County Jail based essentially on what the court characterized as her untruthful testimony.

At the end of all the evidence, and without any

standard jury instruction on the matter, defense counsel made verbal and written requests for a special instruction indicating that the State had to prove that Appellant had "willfully and knowingly" acted. The State made an objection. The trial court refused to accede to the defense's request and, instead, informed the jury that before it could find Appellant guilty, the State had to prove only 1) that Appellant, by means of excavation, removed, attempted to remove, defaced, destroyed, or otherwise altered an archaeological site or specimen; 2) that the site was on land owned or controlled by the State; and 3) that Appellant had no permit for field excavation.

[2][3][4] A trial court's ruling on whether or not to give a specially requested jury instruction is reviewed under an "abuse of discretion" standard. See *Beatty v. State*, 500 So.2d 173, 174 (Fla. 1st DCA 1986). A judgment will not be reversed for failure to give a particular jury charge where, overall, the instructions given are clear, comprehensive, and correct. See *Darty v. State*, 161 So.2d 864 (Fla. 2d DCA 1964). However, in appropriate circumstances, the failure to instruct the jury that criminal intent, or mens rea, is an essential and indispensable component of the charged crime that must be established, constitutes reversible error. See *Chicone v. State*, 684 So.2d 736, 745 (Fla.1996) ("A defendant has the right to have a court correctly and intelligently instruct the jury on the essential and material elements of the crime charged and required to be proven by competent evidence."); *Cohen v. State*, 125 So.2d 560 (Fla.1960) (statute prohibiting sale of obscene material required State to prove defendant's knowledge of obscene nature of material); *Gerds v. State*, 64 So.2d 915 (Fla.1953); *Frank v. State*, 199 So.2d 117 (Fla. 1st DCA 1967).

[5][6] As "the legislature is vested with the authority to define the elements of a crime, determining whether scienter is an essential element of a statutory crime is a question of legislative intent." *Chicone*, 684 So.2d at 741. "The existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Dennis v. United States*, 341 U.S. 494, 500, 71 S.Ct. 857, 95 L.Ed. 1137 (1951). Because offenses requiring no mens rea generally are not favored, some indicia of legislative intent---be it express or implied---is necessary to

eliminate mens rea as an element \*195 of a crime. See *Staples v. United States*, 511 U.S. 600, 605-06, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994).

[7] Appellant asserts, and we agree, that a careful reading of the statute in question discloses no express or implied legislative intent or mandate to omit the requirement of mens rea. Assuming for the sake of argument that the jury instruction given was inadequate, the State contends that any error is harmless beyond a reasonable doubt under *State v. DiGuilio*, 491 So.2d 1129 (Fla.1986), because the evidence against Appellant is overwhelming and the claim that Appellant lacked mens rea is "simply unsupported by the evidence." *Sochor v. Florida*, 504 U.S. 527, 538, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992); *Occhicone v. Singletary*, 618 So.2d 730, 731 (Fla.1993). In focusing primarily upon the evidence that supports the guilty verdict, the State misconstrues the DiGuilio test. See *Long v. State*, 494 So.2d 213 (Fla.1986). Furthermore, the record belies the State's position that the evidence is heavily one-sided in favor of the prosecution.

A witness for the State, Robert Daniels, a wildlife officer with the Florida Game & Fresh Water Fish Commission, provided testimony that contradicts Appellant's testimonial account of the circumstances that led to her arrest in the Aucilla Wildlife Management Area on property owned or leased by the State and under its control. Daniels claimed that during their initial encounter one week prior to Appellant's arrest, he had advised her that the area where he observed her was closed to the public and that removing or collecting artifacts from State-controlled lands was unlawful. Testifying on her own behalf at the trial, Appellant admitted having encountered Officer Daniels in the same area a week before her arrest. However, she purported not to have known that it was a restricted area. Appellant testified that she had believed that she and her companion were on private land.

Given these sharply conflicting accounts regarding what was said in the initial encounter and what Appellant knew about the ownership or control over the site, we cannot say beyond a reasonable doubt that the erroneous refusal to give the requested special instruction on a fundamental and necessary element of the crime charged is harmless. See *Chicone*, 684 So.2d at 745; *Mercer v. State*, 656 So.2d 555 (Fla. 1st DCA 1995). Were we to

accept the State's arguments in favor of affirmance, the statute could be construed to criminalize some conduct that otherwise is perfectly legal. Absent the instruction on scienter (i.e., criminal intent and knowledge), the jury could have found Appellant guilty even without a finding that Appellant knew that she was excavating on "any land owned or controlled by the state or within the boundaries of a designated state archaeological landmark or landmark zone." The failure to give the instruction under these circumstances reduced the State's burden of proof on an essential element of the offense charged, virtually eliminated one of Appellant's chief defenses, and "is tantamount to a denial of a fair and impartial trial." *Chicone*, 684 So.2d at 745; see *Young v. State*, 753 So.2d 725 (Fla. 1st DCA 2000) (reversing and remanding for a new trial, where the standard jury instruction given by the trial court included a prejudicially erroneous definition of the word "maliciously" in a prosecution for aggravated child abuse, thereby permitting the jury to return a guilty verdict without a finding that the appellant actually had ill will, hatred, spite, or an evil intent when she punished her son, and reducing the State's burden of proof on an essential element of the charged offense).

Given our resolution of this appeal on Appellant's first issue, we need not discuss the second question of whether the trial court erred in setting restitution in the amount of \$35,079.35 based on the evidentiary record before it. [FN1] In the interest of \*196 judicial efficiency in any possible future proceedings on this matter in the lower court, however, we note that in oral argument the State conceded that the second issue in the instant case is factually indistinguishable in any material respect from the restitution issue presented in *Cochran v. State*, 724 So.2d 189 (Fla. 1st DCA 1999), in which we reversed the restitution order pursuant to *Glaubius v. State*, 688 So.2d 913 (Fla.1997), and remanded with directions to enter an amended order for a substantially reduced amount of restitution. [FN2]

FN1. Assuming merely for the sake of argument that her conviction were to be affirmed, Appellant does not dispute the imposition of \$1,278.01 of that amount to cover the State's "emergency assessment" of the site.

FN2. We decided *Cochran* after Appellant's trial concluded.

We REVERSE and REMAND for a new trial, with directions to the trial court to give the requested special jury instruction.

ALLEN and WEBSTER, JJ., CONCUR.

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STATE of Utah, Plaintiff and Appellant,  
v.  
James and Jeanne REDD, Defendants  
and Appellees.

No. 981747.

Supreme Court of Utah.

Dec. 28, 1999.

The Seventh District Court, Monticello Department, Lyle R. Anderson, J., dismissed informations that alleged defendants abused or desecrated dead human bodies by disinterring dead bodies at dig site known to have Anasazi ruins. The Court of Appeals, 954 P.2d 230, held that informations were properly dismissed in absence of evidence that bones or bone fragments removed by defendants had been interred. Defendants were recharged with original offense and with removal, concealment, or failure to report finding of dead body or destruction of dead body. Following preliminary hearing, the Seventh District Court, San Juan County, Lyle R. Anderson, J., dismissed new charges and issued bindover on original charges. State took interlocutory appeal. The Court of Appeals certified case. The Supreme Court, Zimmerman, J., held that: (1) moving bones to back dirt pile at site was "removal" within statute, and (2) statute protected partial remains as well as intact bodies.

Reversed and remanded.

[1] COURTS ⇔ 487(1)

106k487(1)

In certifying case for immediate transfer to Supreme Court, Court of Appeals was not permitted to add issues to certification not present in case before it, and thus, where only issue appealed by State was dismissal of new charge of removal, concealment, or destruction of a dead body or any part of it, issue of whether refiling of other charges was merited by evidence and whether refiling violated due process principles of Brickey was not before

Supreme Court. Rules App.Proc., Rule 43(a); U.C.A.1953, 76-9-704(1)(a) (1998).

[2] CRIMINAL LAW ⇔ 1134(3)

110k1134(3)

The proper interpretation of a statute is a question of law which is reviewed for correctness, according no deference to the magistrate's legal conclusion.

[3] DEAD BODIES ⇔ 7

116k7

Defendants, in digging at site of Anasazi runs, "removed a dead body," within meaning of criminal statute, when they took bones out of ground and move them to back dirt piles. U.C.A.1953, 76-9-704(1)(a) (1998).

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

[4] DEAD BODIES ⇔ 7

116k7

Statute prohibiting the removal, concealment, failure to report finding of a dead body to a local law enforcement agency, or "destruction of a dead body or any part of it" reaches the removal, concealment, or failure to report the finding of parts of bodies, such as heads, torsos, arms, legs, bones, or organs. U.C.A.1953, 76-9-704(1)(a) (1998).

[5] STATUTES ⇔ 181(2)

361k181(2)

Where Supreme Court is faced with two alternative readings of statute, and has reliable sources that clearly fix the legislative purpose, Court looks to the consequences of those readings to determine the meaning to be given the statute, with clear preference for reading that reflects sound public policy, as Court presumes that must be what the legislature intended.

[5] STATUTES ⇔ 212.7

361k212.7

Where Supreme Court is faced with two alternative readings of statute, and has reliable sources that clearly fix the legislative purpose, Court looks to the consequences of those readings to determine the meaning to be

given the statute, with clear preference for reading that reflects sound public policy, as Court presumes that must be what the legislature intended.

[6] STATUTES ⇔ 181(2)

361k181(2)

Court interprets a statute to avoid absurd consequences.

[7] DEAD BODIES ⇔ 7

116k7

Defendants' alleged conduct of excavating human bones at Anasazi site and discarding bones in back dirt piles at site was within statute prohibiting the removal, concealment, failure to report finding of a dead body to a local law enforcement agency, or "destruction of a dead body or any part of it," as statute applied to body parts as well as whole bodies. U.C.A.1953, 76-9-704(1)(a) (1998).

\*987 Jan Graham, Att'y Gen., Joanne C. Slotnik, Asst. Att'y Gen., Salt Lake City, and William L. Bengé, Moab, for plaintiff.

Walter F. Bugden, Jr., Salt Lake City, William L. Schultz, Moab, and Rod W. Snow, Denver, Colorado, for defendants.

ZIMMERMAN, Justice:

¶ 1 The State of Utah appeals from a magistrate's dismissal of a charge against James and Jeanne Redd for violating section 76-9-704(1)(a) of the Code by the removal, concealment, or failure to report the finding of a dead body to a local law enforcement agency, or destruction of a dead body or any part of it. [FN1] We agree with the State that the magistrate erred in his interpretation of the statute by concluding that the facts alleged did not constitute a violation, and in dismissing the charges. We reverse and remand for actions consistent with this opinion.

FN1. The court of appeals certified this case to this court pursuant to rule 43 of the Utah Rules of Appellate Procedure, which provides: "In any case over which the Court of Appeals has original appellate jurisdiction, the court may ... certify a case for immediate transfer to the Supreme Court for

determination." Utah R.App. P. 43(a). We assume jurisdiction under section 78-2-2(3)(b) and (5) of the Utah Code.

\*988 ¶ 2 For clarity, we explain the entire history of this case. In January of 1996, Ben Naranjo of the San Juan County Sheriff's Department was contacted by Mike Pehrson, a resident of Bluff, Utah. Pehrson informed Naranjo that he had witnessed several people digging in an area known to have Anasazi ruins. Naranjo drove close to the dig site where he saw the Redds. They asked Naranjo what he was doing there. He responded that someone had observed them digging in the area.

¶ 3 James Redd ("James") stated that they were on Erv Guymon's property and that Guymon had given them permission to be there. Naranjo spoke with Guymon who said that the Redds did have permission to be on the property but not to dig. Guymon said that he would handle the problem with the Redds personally. Despite James' claim that he was on Guymon's property, Naranjo decided to verify ownership of the dig site. A survey was conducted and it was determined that the site was on state land. The San Juan County Sheriff then called in Dale Davidson, an archaeologist, to examine the site.

¶ 4 In October of 1996, the Redds were charged with abuse or desecration of a dead human body, in violation of 76-9-704(1)(b). [FN2] A preliminary hearing was held in March of 1997. Davidson, the archaeologist, testified that the Redds had dug in an archaeological site, which included a kiva, a building, and a midden area. Davidson also testified that the site had been altered and damaged by recent digging. He stated that he found human bones in the wall of the excavated area, as well as in a pile of dirt discarded during the excavation. He also testified that it appeared that the persons digging had excavated a portion of the human remains and discarded them after screening the dirt in which they were buried.

FN2. Section 76-9-704(1)(b) reads:

(1) A person is guilty of abuse or desecration of a

dead human body if the person intentionally and unlawfully:

...

(b) disinters a buried or otherwise interred dead body, without authority of a court order.

Utah Code Ann. § 76-9-704(1)(b) (1995). In 1999, the legislature amended section 76-9-704. It added a new subsection which reads: "For purposes of this section, 'dead human body' includes any part of a human body in any stage of decomposition including ancient human remains." Id. § 76-9-704(1) (1999). However, we apply the law as it existed at the time of the crime charged.

Defendants were also charged with trespassing on trust lands, in violation of section 53C-2-301(1)(f) of the Code. Defendants were bound over on the trespassing charge; this charge was later refiled and no appeal of the charge has been taken.

¶ 5 The magistrate dismissed the charge of abuse or desecration of a dead human body. He made factual findings that the Redds did disinter remains. However, he was uncertain about whether disinterring remains which "presumably are a thousand years old" "constitutes a criminal offense of desecration of a corpse, or abuse or desecration of a dead human body." [FN3] Therefore, he dismissed the charges, stating that the appellate court could clarify whether the law was meant to apply to these facts.

FN3. The magistrate said that there are two schools of thought regarding the appropriate reach of the statute: one adheres to the position "that it doesn't matter how old the remains are, they're still human remains, and they need to be protected from being disturbed.... The other school of thought is, 'Hey wait a minute, you know, there's a rule of reason that has to apply here, [the statute is] talking about disturbing human remains that have been buried in a place that's been set aside for the preserving of human remains, the cemetery.... [T]hese [Anasazi] remains are scattered all over this part of the country.' "

¶ 6 The State appealed the magistrate's decision to the Utah Court of Appeals. At oral argument before the court of appeals, the Redds' attorney conceded that the bones the Redds had removed constitute a "dead body" as defined by the statute. The court of

appeals upheld the magistrate's dismissal on alternative grounds not addressed by the magistrate or briefed by the parties. It reasoned that the statute refers only to dead bodies "buried or otherwise interred" and that this meant that one element of the crime was proof that the body had been intentionally placed "into a place designated for its repose." State v. Redd, 954 P.2d 230, 234 (Utah Ct.App.1998). The court of appeals \*989 held that the State had failed to prove that element of the charged crime. The State petitioned for a rehearing, contending that the court should have taken judicial notice of the fact that midden areas were used as burial grounds by the Anasazi. The court of appeals refused to take judicial notice of this fact. It stated, however, "[n]o party to this action should construe our opinion or this order to preclude the State from refiled the charges under the same or a more appropriate subsection of the statute."

¶ 7 The State followed the suggestion of the court of appeals and refiled the charges against the Redds under section 76-9-704(1)(b). Additionally, it charged the Redds under section 76-9-704(1)(a). It alleged that the Redds "did intentionally and unlawfully remove, conceal, fail to report the finding of a dead body to a local law enforcement agency, or destroy a dead body or any part of it," and that they "did intentionally and unlawfully disinter a buried or otherwise interred dead body, without authority of a court order." The State offered new testimony from Davidson, the archaeologist, regarding burial practices of the Anasazi to support these refiled charges. The Redds moved to dismiss the refiled charges, asserting that their due process rights were being violated. They relied on State v. Brickey, 714 P.2d 644 (Utah 1986), arguing that the "good cause" showing Brickey requires as a precondition for the refiled of dismissed charges exists only when the State has new or previously-unavailable evidence. They asserted that no such evidence existed. Everything Davidson would say was known and available to the State when the first charges were filed. The State responded that it could not have foreseen the need for Davidson's additional testimony until

the court of appeals, sua sponte, added an element to the crime. The parties stipulated that a ruling on the Brickey motion would be reserved until after the preliminary hearing.

¶ 8 A preliminary hearing was held at which Davidson explained that a midden area is "that part of the site where we find the refuse [sic] from human activity.... [V]ery often burials take place in that midden area, because ... it's easy to dig and ... areas that are soft and easy to dig in are very often places--of repose--for humans.... [V]ery often deaths, of course, take place in the winter time when lots of the available ground is frozen and even harder to dig, so those soft areas in the midden are very much utilized as burials." The magistrate bound the defendants over on the refiled original charge, under section 76-9-704(1)(b), of disinterring a buried or otherwise interred dead body without authority of a court order. The magistrate specifically found that the State had shown probable cause to believe that the defendants disinterred human bones that had once been "buried or otherwise interred." However, the magistrate dismissed the second charge, based on section 76-9-704(1)(a) of the Code, of removing, concealing, or failing to report the finding of a dead body to local law enforcement, or destroying a dead body or any part of it. He stated that: "There is no evidence that [the defendants] destroyed, concealed or removed a body or even a bone. The most that can be said is that they may have moved as many as seventeen bones a few feet. This is not removal, concealment or destruction." (Emphasis added.)

[1] ¶ 9 The State sought permission to file an interlocutory appeal on the dismissal of the charge under section 76-9-704(1)(a). The Redds did not appeal the bindover on the refiled charge under section 76-9-704(1)(b). The court of appeals granted the State's petition and certified the case to this court. The court of appeals' certification order stated that the appeal involved two issues: the application and interpretation of Brickey, and the interpretation and effect of sections 76-9-704(1)(a) and (b) of the Code. However, as noted above, the petition for interlocutory appeal did not address either Brickey or 76-9-

704(1)(b); rather it raised only the interpretation of 76-9-704(1)(a). Utah Rule of Appellate Procedure 43(a) provides that the court of appeals may "certify a case for immediate transfer to the Supreme Court." Utah R.App. P. 43(a) (emphasis added). It does not permit the court of appeals to add issues to the certification not present in the "case" before it. Here, the only issue appealed by the State is the dismissal of the section 76-9-704(1)(a) charge. \*990 This charge was not dismissed based on Brickey, but rather because the magistrate interpreted the statute as not being violated by the movement of human bones. Therefore, we conclude that there is neither a Brickey question nor a 76-9-704(1)(b) question before us. The only issue is the proper interpretation of section 76-9-704(1)(a) of the Code.

[2] ¶ 10 We begin with the standard of review. The proper interpretation of a statute is a question of law which we review for correctness, according no deference to the magistrate's legal conclusion. See *Gutierrez v. Medley*, 972 P.2d 913, 914-15 (Utah 1998); *State v. Pena*, 869 P.2d 932, 936 (Utah 1994). With this standard in mind, we address section 76-9-704(1)(a). It reads in pertinent part:

(1) A person is guilty of abuse or desecration of a dead human body if the person intentionally and unlawfully:

(a) removes, conceals, fails to report the finding of a dead body to a local law enforcement agency, or destroys a dead body or any part of it.

Utah Code Ann. § 76-9-704(1)(a) (1995). [FN4]

FN4. While this section has been amended, we apply the law as it existed at the time of the crime charged.

[3] ¶ 11 We start our analysis with the statute's plain language. "The fundamental rule of statutory construction is that statutes are generally to be construed according to their plain language. Unambiguous language in the statute may not be interpreted to contradict its plain meaning." *Zoll & Branch P.C. v. Asay*, 932 P.2d 592, 594 (Utah 1997) (citations omitted); see also *Kimball Condo.*

Owners Ass'n v. County Bd. of Equalization, 943 P.2d 642, 648 (Utah 1997). In the case of unambiguous statutes, this court has a long history of relying on dictionary definitions to determine plain meaning. See, e.g., Zoll & Branch, 932 P.2d at 594; Bryant v. Deseret News Publ'g Co., 120 Utah 241, 233 P.2d 355, 356 (1951). At least one part of 76-9-704(1)(a) is unambiguous: one violates the statute if one "removes a dead body." The magistrate found that while the Redds moved the bones, they did not "remove" them. To determine the correctness of this interpretation, we first resort to the dictionary. The word "remove" is defined variously as: "to change or shift the location, position, station, or residence of" and "to move by lifting, pushing aside or taking away or off." Webster's Third New International Dictionary 1921 (1961). Applying this definition to the statute, it seems clear that when the Redds took the bones out of the ground and moved them to the back dirt piles, they "removed" them within the plain meaning of the statute. Therefore, we find the magistrate's construction of the statute to have been in error.

[4][5][6] ¶ 12 The next question is whether the bones that the Redds removed constituted a "dead body." [FN5] The statute applies to one who "removes, conceals, fails to report the finding of a dead body to a local law enforcement agency, or destroys a dead body or any part of it." Utah Code Ann. § 76-9-704(1)(a) (1995). This clause can be read in two ways. First, it can be read as prohibiting only (i) the removal, concealment, or failure to report the finding of an intact dead body, or (ii) the destruction of an intact dead body or a part of it. Under this reading, the negative implication is that the statute permits the removal, concealment, or failure to report the finding of body parts. Alternatively, the statute could be read as prohibiting (i) the removal, concealment, failure to report the finding of, or the destruction of (ii) a dead body or any part of it. Where we are faced with two alternative readings, and we have no reliable sources that clearly fix the legislative purpose, we look to the consequences of those readings to determine the meaning to be given

the statute. Our clear preference is the reading that reflects sound public policy, as we presume that must be what the legislature intended. See Schurtz v. BMW of North America, Inc., 814 P.2d 1108, 1113 (Utah 1991). In other words, we interpret a statute to avoid absurd consequences. See Clover v. Snowbird Ski Resort, \*991 808 P.2d 1037, 1045 n. 39 (Utah 1991); see also Alta Indus. Ltd. v. Hurst, 846 P.2d 1282, 1292 n. 24 (Utah 1993).

FN5. Although this point was conceded by the Redds' counsel before the court of appeals in the first case, we do not assume that concession is binding for the purposes of this appeal.

¶ 13 We conclude that the results produced by the first of the two readings proposed, which would restrict the statute's reach to intact human bodies and would not reach the removal, concealment, or failure to report the finding of parts of bodies, such as heads, torsos, arms, legs, bones, or organs, is not in accord with any sound public policy. Therefore, we adopt the second reading: the statute prohibits the removal, concealment, failure to report the finding of, or the destruction of a dead body or any part of it.

¶ 14 On the facts of the present case, it may be that reading this statute as protecting partial remains of a thousand-year-old Anasazi will not accord with the expectations of some persons, as the trial judge noted. See note 3, supra. But a moment's reflection should demonstrate the soundness of the broader public policy our interpretation advances. It will protect the partial remains of many with whom people today can readily identify, such as pioneers buried long ago in crude graves, [FN6] or of war dead, [FN7] or of victims of horrendous accidents, [FN8] or crimes. [FN9] Certainly, these remains deserve protection, and we conclude that the legislature intended to grant it in section 76-9-704(1)(a).

FN6. See Conrad Walters, 'Modern Technology' Saves Day in Salvaging Bones, Salt Lake Tribune, July 26, 1986, at B1 (discussing discovery of bones and teeth of early Mormon pioneer child buried in

Fremont Indian midden); see also Paul Rolly, *Pioneers to Get New Graves*, Salt Lake Tribune, August 16, 1986, at B1 ("The State Parks and Recreation Board has voted to rebury the remains of 32 early pioneers and Indians discovered near downtown Salt Lake City. ").

Appeals Judge Russell W. Bench sat.

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FN7. See Associated Press, *China Hands Over Remains of Airmen Killed in WWII*, Deseret News, Jan. 17, 1997, available in Deseret News Archives (recounting finding remains of American soldiers who died 52 years earlier, were placed in metal boxes, and returned home).

FN8. See Associated Press, *Did Deactivated Part Trigger Crash?*, Deseret News, Nov. 3, 1999, available in Deseret News Archives ("Authorities have publicly said they have found only one body and do not expect to find other bodies intact [from Egypt Air airplane crash].").

FN9. See *State v. Hamilton*, 827 P.2d 232, 234 (Utah 1992) (recounting discovery of murder victim: "Both hands, feet, and breasts, the head, and the left arm had been removed.... [O]fficers ... discovered breast tissue.... The other missing body parts were never recovered."); see also *More Body Parts Found*, Salt Lake Tribune, Nov. 15, 1999, at B2 ("After a two-day search, Duchesne County sheriff's deputies have found more body parts on the Pinder Ranch more than a year after the scattered remains of two bodies were found there.... The victims were shot and their bodies were blown up in an apparent attempt to destroy the evidence.").

[7] ¶ 15 Because the Redds "removed" parts of a "dead body," and because the statute applies to body parts as well as whole bodies, we find the magistrate's interpretation of the statute to be in error. The Redds should have been bound over for trial under section 76-9-704(1)(a) of the Code.

¶ 16 Reversed and remanded.

¶ 17 Chief Justice HOWE, Associate Chief Justice DURHAM, Justice RUSSON, and Judge BENCH concur in Justice ZIMMERMAN'S opinion.

¶ 18 Having disqualified himself, Justice Stewart does not participate herein; Court of

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## Charges Dismissed Against Blanding Couple Accused of Raiding 'Anasazi' Burial Ground

Friday, June 16,  
2000BY CHRISTOPHER SMITH  
THE SALT LAKE TRIBUNEEMAIL THIS  
ARTICLE

All charges have been dismissed against a Blanding physician and his wife accused of desecrating an American Indian burial ground, the third time in as many years the case against James and Jeanne Redd has been thrown out without ever going to trial.

But if history holds true for the drawn-out legal saga of the Redds, this latest dismissal will be appealed, as were the previous two.

In an order filed Tuesday with the 7th District Court in Monticello, Juvenile Court Judge Mary Manley of Moab -- who only recently took over the case following Judge Lyle Anderson's recusal -- granted a defense motion to dismiss all charges against the couple.

Manley said prosecutors had insufficient grounds to refile charges against the couple after the first charges were dismissed in 1997.

The Redds had each faced felony charges of desecrating a dead human body and misdemeanor charges of trespassing on state Trust Lands for allegedly digging in a recognized "Anasazi" Indian dwelling site in Cottonwood Wash on state land near the southeastern Utah town of Bluff on Jan. 6, 1996.

The first time the couple was charged -- after a lengthy delay that prompted Southwestern Indian leaders to claim the prominent couple was getting preferential treatment -- Anderson dismissed the felony counts after determining that fragments of prehistoric bone did not constitute a dead human body under state law.

Prosecutors appealed, but the Court of Appeals upheld Anderson's dismissal on grounds not related to the question of bones versus body. Instead, the court said prosecutors never presented evidence the Anasazi bones were intentionally buried in a place of final repose.

The appellate court stuck to its controversial decision after a rehearing request, but added a caveat to its ruling: Prosecutors were free to refile charges against the Redds and this time they could present evidence that the human bones allegedly unearthed by the pothunters were indeed buried in a final resting place.

In October 1998, the state refiled the charges and produced expert testimony that Anasazi Indians traditionally buried their dead in refuse piles known as "middens," and that the digging at Cottonwood Wash was concentrated in the midden. Anderson subsequently bound

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the couple over for trial.

But in her ruling, Manley agreed with the Redds' attorneys that the additional information about Anasazi burial practices did not rise to the level of "new or previously unavailable" evidence that the Utah Supreme Court said in 1986 is required to justify refiling charges. Another appeals court ruling earlier this year expanded that "good cause" benchmark to rule out "innocent miscalculation" by prosecutors about the amount of evidence required for refiling charges.

State prosecutors are studying the latest ruling to determine whether to appeal. In December, the Utah Supreme Court overturned Anderson's 1998 dismissal of felony charges against the Redds of "removing, concealing or destroying a dead body," with the high court contending the judge erred in his interpretation.

"The Redds should have been bound over for trial," the unanimous opinion stated.

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IN THE UTAH SUPREME COURT

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STATE OF UTAH, :  
Plaintiff/Appellant, :  
v. : Case No. 20000556-CA  
JAMES REDD AND JEANNE REDD, : Priority No. 2  
Defendants/Appellees. :

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BRIEF OF APPELLANT

APPEAL FROM DISMISSAL OF AN INFORMATION  
CHARGING TWO ALTERNATIVE COUNTS OF ABUSE OR  
DESECRATION OF A DEAD HUMAN BODY, A THIRD  
DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN.  
§ 76-9-704 (1996), IN THE SEVENTH JUDICIAL  
DISTRICT COURT IN AND FOR SAN JUAN COUNTY,  
THE HONORABLE MARY L. MANLEY, PRESIDING

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IN THE UTAH SUPREME COURT

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STATE OF UTAH, :  
Plaintiff/Appellant, :  
v. : Case No. 20000556-CA  
JAMES REDD AND JEANNE REDD, : Priority No. 2  
Defendants/Appellees. :

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BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS

The State appeals an order of the district court dismissing an information charging two alternative counts of abuse or desecration of a dead human body, a third degree felony, in violation of Utah Code Ann. § 76-9-704 (1996). At the inception of this appeal, the court of appeals had jurisdiction over the case pursuant to Utah Code Ann. § 77-18a-1(2)(a) (1996). Pursuant to the State's suggestion for certification, however, the court of appeals certified the case for immediate transfer to this Court, pursuant to rule 43(a) of the Utah Rules of Appellate Procedure. See addendum A.

STATEMENT OF THE ISSUE ON APPEAL AND

STANDARD OF APPELLATE REVIEW

Does the Brickey rule, notwithstanding the court of appeals interpretation of it in State v. Morgan, 2000 UT App. 48, 997 P.2d 910, cert. granted, 4 P.3d 1289 (Utah 2000), permit refiling

in this case, where the record reveals no prosecutorial abuse and defendants' right to due process is not implicated?

Interpretation of caselaw presents a question of law, reviewed for correctness. State v. Larsen, 865 P.2d 1355, 1357 (Utah 1993); State v. Shipler, 869 P.2d 968, 969 (Utah App. 1994).

#### CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Ann. § 76-9-704 (1996), governing abuse or desecration of a dead human body, is appended to this brief at addendum B.

#### STATEMENT OF THE CASE

Defendants were originally charged, in October of 1996, with one count of abuse or desecration of a dead human body for disinterring human bones from an archaeological site near Bluff, Utah (case #1: 1-2).<sup>1</sup> The section under which defendants were charged read:

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<sup>1</sup> To provide the Court with all relevant background information, the records and transcripts relating to the previous case against each defendant (district court case nos. 9617-229 and 9617-230) as well as this case (district court case nos. 9817-63 and 9817-64) have been designated as part of the record on appeal. For simplification, because the cases against both defendants arise out of the same facts, because the cases have been treated as consolidated both by the parties and the appellate courts, and because the records are largely duplicative, the State will refer only to the James Redd records, citing either to Case #1 (case no. 9617-229) or Case #2 (case no. 9817-64). Citations from the transcripts associated with each case are designated by case number, followed by "Tr." and an appellate page number. All other record citations are to the red record volumes.

(1) A person is guilty of abuse or desecration of a dead human body if the person intentionally and unlawfully:

(b) disinters a buried or otherwise interred dead body, without authority of a court order.

Utah Code Ann. § 76-9-704 (1)(b) (1996) or addendum B.<sup>2</sup>

Following a preliminary hearing in March of 1997, the magistrate dismissed the charge, reasoning that ancient human remains did not constitute a "dead human body" within the meaning of the statute (Case #1: 109-11). The State appealed.

Interpreting the statute for the first time, the court of appeals affirmed the dismissal on an alternative ground not addressed by the magistrate or briefed by either party. See State v. Redd, 954 P.2d 230, 232-33 (Utah App. 1998), rev'd by State v. Redd, 1999 UT 108, 992 P.2d 986 or addendum C. Focusing on the statute's reference to dead bodies "buried or otherwise interred," the court of appeals held that, wholly apart from proof of disinterment, this phrase required proof that the body had been intentionally deposited "into a place designated for its repose" as a separate and distinct element of the crime.<sup>3</sup> Redd,

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<sup>2</sup> Defendants were also charged with one count of trespassing on trust lands, a class B misdemeanor, in violation of Utah Code Ann. § 53C-2-301(1)(f) (1996). That charge has been consolidated into this case by stipulation but has no bearing on this appeal.

<sup>3</sup> In a later order, the court of appeals articulated that "[b]ecause defense counsel conceded at oral argument that the bone fragments would satisfy the 'dead body' requirement of the

954 P.2d at 234. The court of appeals concluded that although the State had adduced evidence that the human remains had been "disinterred," it had not adduced independent proof that they had previously been "buried or otherwise interred." Based on its sua sponte interpretation and articulation of these statutory elements, the court of appeals affirmed the magistrate's dismissal of the charge.<sup>4</sup>

The State filed a petition for rehearing, focusing on a single narrow legal issue. Although the resolution of that issue has no bearing at this juncture, the court of appeals included a footnote in its order denying the petition, specifically warning that "[n]o party to this action should construe our opinion or this order to preclude the State from refileing the charges under the same or a more appropriate subsection of the statute" (Case #2: 48 n.2).<sup>5</sup>

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statute we deemed it unnecessary to, and did not, discuss the meaning of that statutory language" (Case #2: 44-45 n.1).

<sup>4</sup> The court of appeals articulated three elements of the crime: 1) "that the dead body at issue be shown to have been placed in a location designated for its repose"; 2) "that a defendant unearth or uncover a dead body and remove it from the place of interment"; and 3) "that the defendant acted intentionally when he or she disinterred the interred dead body." Redd, 954 P.2d at 234.

<sup>5</sup> The court also clarified that its earlier opinion, "although upholding the trial court's refusal to bind over the defendants, does not hold that disinterring prehistoric bones in a proven Anasazi burial site is not a crime under the statute." Case #2: 44 (emphasis in original).

In June of 1998, the State refiled charges against defendants (Case #2: 1-2). Taking the court of appeals' apparent guidance, the State charged defendants under the original statutory subsection as well as an additional subsection that specifically referred to "a dead body or any part of it." Utah Code Ann. § 76-9-704(1)(a) (emphasis added). The two charges tracked the statutory subsections as follows:

(1) A person is guilty of abuse or desecration of a dead human body if the person intentionally and unlawfully:

(a) removes, conceals, fails to report the finding of a dead body to a local law enforcement agency, or destroys a dead body or any part of it;

(b) disinters a buried or otherwise interred dead body, without authority of a court order.

Utah Code Ann. § 76-9-704 (1)(a), (b) (1996) or addendum B.

The next month, defendants filed a motion to dismiss the case (Case #2: 8-9). Citing State v. Brickey, 714 P.2d 644 (Utah 1986), they argued that refiling should not be permitted because the charges were the same and no new evidence had been discovered. Defendants contended that where the State had simply failed to adduce the evidence necessary to establish probable cause for a bindover, good cause for refiling had not been established (Case #2: 10-15; 36-42). The parties stipulated that the ruling on this motion would be reserved until after the preliminary hearing. Id. at 64.

In October of 1998, at a preliminary hearing on the refiled charges, the State adduced evidence addressing "interment," the element that the court of appeals had found lacking in the earlier preliminary hearing.<sup>6</sup> The magistrate then bound defendants over on the original charge of disinterring a buried or otherwise interred dead body. See Utah Code Ann. § 76-9-704(1)(b). In so doing, the magistrate stated:

Were this magistrate to rule on the Brickey issue solely on the basis of the language in Brickey, he would consider himself compelled to prohibit further prosecution of defendants. However, the language of footnote 2 of the Utah court of appeals [sic] order on the state's petition for rehearing strongly suggests the creation of an additional Brickey exception where the prosecutor failed to recognize the need for proof of an element of the offense. This court takes that language as announcing an intention to create such an exception under the "other good cause" prong of Brickey and accordingly denies defendants' motion to dismiss.

Case #2: 67.

However, the magistrate did dismiss the new charge of "remov[ing], conceal[ing] . . . or destroy[ing] a dead body or any part of it." Utah Code Ann. § 76-9-704(1)(a). In so doing, the magistrate declared:

There is no evidence that [defendants] destroyed, concealed or removed a body or

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<sup>6</sup> The parties stipulated that the magistrate could also consider the evidence adduced at the 1997 preliminary hearing (Case #2: 64).

even a bone. The most that can be said is that they may have moved as many as seventeen bones a few feet. This is not removal, concealment or destruction. Count I is accordingly dismissed.

Case #2: 72.

In response to the dismissal of the "removal" charge, the State filed a petition for permission to file an interlocutory appeal in the court of appeals.<sup>7</sup> The court of appeals granted the petition and then immediately certified the case to this Court (Case #2: 87). This Court held that the State had shown probable cause to believe the bones had been "removed," as that term is commonly used and that, consequently, defendants should have been bound over on the section 76-9-704(1)(a) charge. State v. Redd, 1999 UT 108, ¶11, 992 P.2d 986, or addendum D. Accordingly, this Court reversed and remanded the case back to district court. Id. at ¶16.

Back in district court on the second information and appearing before a different judge,<sup>8</sup> defendants filed a motion to

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<sup>7</sup> The sole question of law presented was whether the magistrate erred in determining that moving human bones from their place of interment could not, as a matter of law, establish probable cause to believe the bones had been "remove[d]," as that term is used in Utah Code Ann. § 76-9-704(1)(a).

<sup>8</sup> Judge Lyle Anderson recused himself from the case. In his capacity as presiding judge of the Seventh Judicial District, he assigned juvenile court judge Mary Manley to sit by designation. His order states that "[t]his assignment accords with the general practice of this district to cross assign juvenile and district judges to minimize travel and promote judicial economy." Case #2: 150.

dismiss or to quash the bindover based on Brickey (Case #2: 114). They argued that the evidence of interment presented by the State at the second preliminary hearing was not new or previously unavailable and did not provide good cause for refiling. Id. at 115-20. In a supplemental memorandum, they argued that an opinion issued by the court of appeals in February of 2000, State v. Morgan, 2000 UT App. 48, 997 P.2d 910, cert. granted, 4 P.3d 1289 (2000) or addendum E, effectively precluded interpreting good cause to include an innocent miscalculation of the quantum of evidence necessary to obtain a bindover (Case #2: 127-29).

The district court, adopting defendants' reasoning, granted the motion and dismissed the entire information against defendants. The court stated:

Lack of new evidence and innocent miscalculation as to the evidence required to obtain a bindover are the two areas that Brickey and Morgan together set forth as insufficient grounds to permit a refiling of charges after dismissal. It is those very claims that the state sets forth in this case. While the practical application of these cases may be unduly restrictive on the prosecution, in light of Brickey and Morgan, this court is compelled to grant the Defendants' Motion.

Id. at 154 or addendum F. The State now timely appeals from the district court's order dismissing the case. Id. at 156-57.

STATEMENT OF THE FACTS<sup>9</sup>

On the afternoon of January 6, 1996, Ben Naranjo of the San Juan County Sheriff's Office was contacted by dispatch and told that Mike Pehrson, a resident of Bluff, wanted to talk to him "as soon as possible" (Case #1: Tr. at 69).<sup>10</sup> Naranjo immediately went to Pehrson's home, where Pehrson informed him that he and his stepson, while hiking, had observed several people digging in an area known to contain Anasazi ruins (Id. at 70). Erv Guymon, who was present when Naranjo arrived and who owned property in the area Pehrson described, told Naranjo that "if it was on his property, nobody had permission at that time to be on there" (Id.).

Naranjo, with Pehrson accompanying him, then drove to the dig site, located about five miles outside of Bluff, up a dirt road in South Cottonwood Canyon (Id. at 70, 82).<sup>11</sup> As they

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<sup>9</sup> While the issue before the Court presents a question of law only, the State articulates the underlying facts as they were adduced at the two preliminary hearings, as a courtesy to the Court and to explain the context in which the legal question arose.

<sup>10</sup> For clarity, the hearing transcripts are identified with "Tr." preceding the appellate record page number. In contrast to the transcript in Case #1, where each transcript page bears an appellate page number, the transcript in Case #2 reflects a single appellate page number on the cover page. Consequently, it will be designated as "Tr. 164" followed by the internal page number.

<sup>11</sup> According to Naranjo, Cottonwood Canyon was generally known around Bluff as Guymon's property. The canyon was accessed by a single, gated road (Case #1: Tr. at 78). Pehrson lived just

approached the site, they observed a pickup truck with vanity license plates reading "ANASAZI." Three children were standing near the vehicle (Id. at 71). Naranjo asked the children if there was any digging going on, and they responded that there was, but that they were on Erv Guymon's property with his permission (Id.).

Defendants then came running down from the dig site, which was located up a little hill, out of sight, and asked Naranjo why he was there and what he was doing (Id.). When Naranjo explained that someone had observed them digging, defendants asked for details, claiming that Erv Guymon had given them permission some three weeks earlier to be on the property (Id. at 72). During this conversation, Phil Hall, who ran what defendant James Redd described to Naranjo as "that liberal democratic newspaper down in Bluff," drove up. Agitated by Hall's presence, defendant said to Naranjo, "Get him out of here. I don't want to speak with him" (Id. at 73). At this juncture, Naranjo decided to "just back off and go talk to Mr. Guymon and ask him about permission to be on his property" (Id.).<sup>12</sup> Later investigation established

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below the gate (Id. at 79).

<sup>12</sup> Despite an earlier statement that no one had permission to be on his property (Case #1: Tr. at 70), Erv Guymon later told Naranjo that he remembered giving defendants permission to be on the land, but not to dig. In any event, Guymon said that he and James Redd were friends, and that he would take care of the matter (Id. at 74).

that the dig site was on state land (Id. at 97).

An archaeologist from the Bureau of Land Management described the site and the indications of digging that he observed three days after the confrontation with defendants. As to the general site, he explained:

The site itself consisted of a building that was about 30 feet across and sort of a north-to-south access with a courtyard in front and a kiva to the south, and east of that, a midden area. . . .

(Id. at 100). The archaeologist later explained the meaning and significance of the term "midden":

A midden, in archaeological terms, is that part of the site where we find the refuse from human activity, whatever has been left over from the daily course of life: broken pottery, the cleaning out the fire pits, and all those other things that regenerates [sic] in your daily living activity. . .

[E]thnographic sources [say] that very often burials take place in that midden area, because, first of all, it's easy to dig and especially with primitive tools . . . areas that are soft and easy to dig are very often the places - of repose for - humans. The second point being that very often deaths, of course, take place in the winter time when lots of the available ground is frozen and even harder to dig, so those soft areas in the midden are very much utilized as burials.

Case #2: Tr. 164: 9, 10; accord id. at 34. The Director of the Cultural Preservation Office for the Hopi Tribe, in culturally linking the burial practices of his own tribe with the Anasazi, observed that even today some Hopi bury their dead in middens. Id. at 34. He stated: "When we take a look at past archaeology,

we find that the practice that Hopi still hold today was indeed very common in prehistory times. We find that the areas most popular for the burying of deceased a long time ago was in midden areas." Id.

Describing the damage to the midden in this case, the archaeologist testified:

[T]here was a large rectangular hole that had been -- been dug into that midden, and the resulting back dirt from that excavation was piled in the immediate vicinity of the -- of the hole.

Case #1: Tr. at 100. He opined that the digging was very recent, observing that

on the back dirt piles . . . where the screens had been laid that were . . . used to process the dirt[,]. . . [y]ou could still see the impressions of . . . the screens on the dirt and . . . because . . . no rain had taken place, the dirt was very soft . . . [and] that kind of information would have blown away very quickly.

Id. at 101.

The archaeologist testified that he found 13-15 bones, "generally within very close proximity to those areas of . . . dirt that had been recently screened, as if they had been on screen there [sic] and sort of tossed out" (Id. at 103). In addition, he observed one human bone fragment "still in the wall of the excavated area" (Case #2: Tr. 164: 13). The archaeologist stated, "I felt very strongly that they were human remains" (Case #1: Tr. at 103).

The Hopi witness, describing "the living spiritual connection" of his people to their ancestors' final resting place, testified: "With our clan connection into this particular region and the beliefs associated with death and dying[,] . . . the burials that we now encounter are hallowed ground" (Case #2: Tr. 164: 35).

#### SUMMARY OF ARGUMENT

This case focuses on the propriety of the district court's dismissal of refiled charges against defendants. In granting defendants' motion to dismiss or quash the bindover, the district court relied on this Court's opinion in Brickey and on a recent court of appeals opinion, Morgan, which interprets Brickey.

Morgan, a split decision now before this Court on certiorari review, fundamentally alters Brickey by severing the Brickey rule from its due process roots. When the Brickey rule and its rationale are properly rejoined, the propriety of refiling in this case is clear.

Brickey holds that after a magistrate has dismissed a charge for insufficient evidence, state due process forbids refiling unless the State can show that new or previously unavailable evidence has surfaced or some other good cause justifies refiling. While the instant case does not involve new or previously unavailable evidence, it does present "other good cause" for refiling. Specifically, where the State innocently

miscalculated the amount of evidence necessary for a bindover, and where a changed circumstance - the articulation of new law by an appellate court - arose directly from the dismissal, and where defendants' due process rights are not implicated, neither the Brickey rule nor the due process rationale underlying it present a bar to refiling.

Morgan, on which the court of appeals relied in dismissing the case, is fundamentally flawed because it ignores the due process underpinning of the Brickey rule. By casting a net so wide as to effectively forbid refiling in cases with no due process implications, Morgan undermines the essential guiding principle of Brickey and forbids refiling in this case. It would thus unnecessarily impair the State's ability and obligation to pursue a well-founded criminal prosecution without protecting any legitimate due process interests of defendants.

Fisk represents a better model from which to seek guidance. There, the court of appeals not only analyzed whether new or previously unavailable evidence or other good cause justified refiling, but also engaged in an analysis of whether the refiling would violate defendant's right to due process. Finding new evidence and no due process infringement, the court determined that Brickey would permit refiling. The same result should follow here.

ARGUMENT

NOTWITHSTANDING THE COURT OF  
APPEALS' DECISION IN MORGAN,  
BRICKEY PERMITS THE STATE TO REFILE  
CHARGES WHERE THE RECORD REVEALS NO  
PROSECUTORIAL ABUSE AND WHERE  
DEFENDANTS' RIGHT TO DUE PROCESS IS  
NOT IMPLICATED

In dismissing the case against defendants, the trial court relied on this Court's decision in State v. Brickey, 714 P.2d 644 (Utah 1986), as interpreted by the court of appeals in State v. Morgan, 2000 UT App. 48, 997 P.2d 910, cert. granted, 4 P.3d 1289 (Utah 2000). See Case #2: 152-54 or addendum F. The trial court's ruling concludes:

Lack of new evidence and innocent miscalculation as to the evidence required to obtain a bindover are the two areas that Brickey and Morgan together set forth as insufficient grounds to permit a refiling of charges after dismissal. It is those very claims that the state sets forth in this case. While the practical application of these cases may be unduly restrictive on the prosecution, in light of Brickey and Morgan, this court is compelled to grant the Defendants' Motion.

Case #2: 154 or addendum F. Morgan, a split decision currently before this Court on certiorari review, fundamentally alters Brickey by divorcing its limitation on refiling from its underlying due process rationale. When the Brickey rule and its rationale are properly rejoined, the propriety of refiling in this case becomes apparent.

a. Brickey: The Governing Law

The law is well settled that a preliminary hearing magistrate must dismiss an information and discharge a defendant if the State's evidence fails to establish probable cause to believe that a defendant has committed the charged crime. Utah R. Crim. P. 7(h)(3). However, "[t]he dismissal and discharge do not preclude the State from instituting a subsequent prosecution for the same offense." Id. Rule 7, then, by its plain language, permits refiling as a general proposition.

Nonetheless, the State's ability to refile a dismissed charge is limited by state constitutional due process protections. In Brickey, this Court held that after a magistrate has dismissed a charge for insufficient evidence, state due process forbids refiling the same charge unless the State "can show that new or previously unavailable evidence has surfaced, or that other good cause justifies refiling." Brickey, 714 P.2d at 647. Although Brickey did not reach the issue of what might constitute "other good cause," it noted that other jurisdictions have found that good cause may exist "when a prosecutor innocently miscalculates the quantum of evidence required to obtain a bindover." Id. at 647 n.5 (citing Harper v. District Court, 484 P.2d 891, 897 (Okla. 1971)).

The policies and protections underlying the Brickey rule provide guidance in understanding the rule and properly defining

its intended ambit. First, in Brickey, this Court noted that granting the State unbridled discretion in determining whether to refile charges raises the intolerable specter of the State continually harassing a defendant who previously had charges dismissed for insufficient evidence. Brickey, 714 P.2d at 646-47. Thus, one important purpose underlying the Brickey rule is to protect defendants from intentional prosecutorial harassment arising from repeated filings of groundless claims before different magistrates in the hope that some magistrate will eventually bind defendants over for trial. Id. at 647; accord State v. Fisk, 966 P.2d 860, 864 (Utah App. 1998) (Brickey rule "ensures that the defendant is not harassed by repeated charges on tenuous grounds").

A second significant purpose inheres in the Brickey dicta interpreting "good cause" to include an innocent miscalculation of the evidence necessary to establish probable cause for a bindover. Id. at 647 n.5. This language implies an additional underlying purpose of preventing the State from intentionally holding back crucial evidence in order to impair a defendant's pre-trial discovery rights and ambush him at trial with the withheld evidence - "sandbagging".

Overreaching by the State, either by prosecutorial harassment in the form of "forum shopping" or "sandbagging," is the chief evil to be prevented by the Brickey rule. To the

extent that these overzealous practices may infringe on a defendant's right to due process, Brickey justifiably limits the State's ability to refile charges that have been dismissed for insufficient evidence. Brickey, however, does not indicate any intent to forbid refiling generally or to preclude refiling where a defendant's due process rights are not implicated. The lodestar of Brickey, then, is fundamental fairness.

In delineating grounds for refiling that would comport with due process, Brickey adopts the approach taken by Oklahoma:

[W]hen a charge is refiled, the prosecutor must, whenever possible, refile the charges before the same magistrate who does not consider the matter de novo, but looks at the facts to determine whether the new evidence or *changed circumstances* are sufficient to require a re-examination and possible reversal of the earlier decision dismissing the charges.

Brickey, 714 P.2d at 647 (citing with approval Jones v. State, 481 P.2d 169, 171-72 (Okla. Crim. App. 1971) (footnote omitted) (emphasis added)). A change in circumstances may thus constitute "other good cause" and provide justification for refiling charges, if a defendant's due process rights are not implicated by the changed circumstances.

This case falls squarely within the four corners of the Brickey rule because it involves both an innocent miscalculation of the quantum of evidence necessary for a bindover and a changed circumstance, without ever implicating defendants' right to due

process.

First, as to the innocent miscalculation, the original preliminary hearing amply demonstrates the "innocent miscalculation" not only of the prosecutor, but of defense counsel and the magistrate as well. The original preliminary hearing and the magistrate's ruling arising out of that hearing focused wholly on whether the "human remains" at issue in this case came within the ambit of the statutory term "dead human body." The State admittedly adduced no evidence of "interment," the element later revealed by the court of appeals to be the source of the miscalculation. However, where defense counsel did not file a motion to dismiss for failure to establish probable cause of "interment" and where the magistrate's ruling was similarly silent as to that element, strong circumstantial evidence supports an innocent miscalculation by everyone in the courtroom as to the statutory requirements. That is, the record itself objectively supports the "good faith ignorance" of all involved. Because the relevant statute had never before been construed by an appellate court, no one at the preliminary hearing had any idea that "interment" was an element of the crime wholly separate and apart from "disinterment."

Second, a "changed circumstance" justifying refiling arose some eleven months after the magistrate originally dismissed the case. The "changed circumstance" was the court of appeals'

opinion in State v. Redd, 954 P.2d 230 (Utah App. 1998) or addendum C, which construed the relevant statute and sua sponte declared a heretofore unarticulated element of the offense. The changed circumstance of new law generated by an appellate court in direct response to the earlier dismissal of the case created the need for the evidence that the State had not previously introduced.

Finally, as to due process, neither of the concerns on which Brickey justifiably focused are implicated here. Plainly, forum-shopping is not at issue. Both preliminary hearings were held before the only magistrate in San Juan County.<sup>13</sup> Nor is there any evidence to even remotely suggest that the State purposefully withheld evidence to harass defendants or to gain some later advantage at trial. And, practically speaking, because the magistrate had already found probable cause as to two of the elements of the crime, the only issue at the second preliminary hearing was whether the State could establish probable cause as to the newly-articulated third element of the offense. Had the State failed to do so, the magistrate would have been compelled to dismiss, and the matter would have been definitively concluded. Consistent with Brickey, then, permitting refiling in

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<sup>13</sup> Hon. Lyle Anderson, who served as magistrate for both preliminary hearings, is also the only district court judge in the county. While the case is now under the aegis of a different judge, that action was initiated by Judge Anderson, not by the State.

this case would advance the utility of the preliminary hearing as "a screening device to 'ferret out . . . groundless and improvident prosecutions.'" Brickey, 714 P.2d at 646 (quoting State v. Anderson, 612 P.2d 778, 783-84 (Utah 1980)).

The facts of this case plainly do not raise the specter either of harassment of defendants through forum-shopping or purposeful obfuscation of evidence through sandbagging, the two primary abuses against which the Brickey rule protects. Where these abuses are not present, and where defendants' due process rights are not implicated, Brickey permits refiling of criminal charges against defendants.

**b. Morgan: A Flawed Interpretation of Brickey**

Recently, in State v. Morgan, the court of appeals has set the Brickey rule adrift from its due process anchor, broadening its scope without regard for the fundamental constitutional concern underlying its original formulation. Morgan casts a net so broad as to effectively forbid refiling in cases with no due process implications. Consequently, Morgan undermines the essential guiding principle of the Brickey rule.<sup>14</sup>

In Morgan, defendant faced a felony drug charge of possession with intent to distribute. While the State had two police officers present in court, sworn and ready to testify, it

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<sup>14</sup> This Court granted certiorari in Morgan. See Morgan, 4 P.3d 1289 (Utah 2000). The State is currently preparing the brief of appellant.

called only the arresting officer. Morgan, 2000 UT App 48, ¶2. The magistrate thereafter determined that the evidence was insufficient to support an intent to distribute, amended the charge to simple possession, and bound defendant over on the reduced charge. Id. at ¶3. The State indicated that it had assumed the arresting officer's testimony would be sufficient and asked to introduce the testimony of the second officer, who was still in the courtroom. The magistrate denied the request because he believed the entry of the bindover order terminated his jurisdiction. Id. The magistrate then granted the State's request to dismiss the charges without prejudice.<sup>15</sup> Id. at ¶4. The State refiled charges, a second preliminary hearing was held before the same magistrate, both witnesses testified, defendant was bound over, her counsel moved to quash the bindover, and the court denied the motion. Id. at ¶5. A jury found defendant guilty of the felony drug charge. Id. at ¶6.

On appeal, the court of appeals determined that the testimony of the second officer at the second preliminary hearing following dismissal for insufficient evidence was not "new or previously unavailable evidence." Id. at ¶14. Because the State had simply miscalculated the quantum of evidence necessary for a

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<sup>15</sup> The court of appeals notes the inconsistency in the magistrate's conflicting positions that entry of the bindover terminated his jurisdiction and his later "implicit conclusion" that he still retained jurisdiction to dismiss the charges. See Morgan, 2000 UT App. 48 at ¶4 n.2.

bindover, the case squarely questioned whether an innocent miscalculation would suffice as "good cause" for refiling so that additional evidence could be presented.<sup>16</sup>

The court of appeals first properly acknowledged Brickey's holding that the discovery of "new or previously unavailable evidence" or "other good cause" would justify refiling.<sup>17</sup> Id. at ¶15. Morgan then goes on to effectively reject Brickey's suggestion that an innocent miscalculation of the quantum of evidence necessary for a bindover may in and of itself suffice as another subcategory of "good cause" for refiling charges:

Consequently, until and unless our supreme court directs otherwise, the innocent miscalculation of the quantum of evidence required to obtain a bindover is not grounds for refiling the dismissed charges unless new or previously unavailable evidence results from a nondilatory investigation prompted by realization of the miscalculation.

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<sup>16</sup> While the facts of Brickey and Morgan are remarkably analogous and while both appellate courts ultimately refused to permit refiling, the cases differ in one key respect. The prosecutor in Brickey candidly admitted he was forum-shopping, while no such overreaching infected Morgan. Thus, Brickey implicates due process, while Morgan does not. Compare Brickey, 714 P.2d at 647 with Morgan, 2000 UT App. 48, ¶13.

<sup>17</sup> Brickey's language makes plain that "good cause" represents a broad category, with "new or previously unavailable evidence" as but two examples of subcategories that come within its ambit. "Other good cause," then, on its face, simply means additional subcategories, other than "new evidence" or "previously unavailable evidence," that justify refiling. An "innocent miscalculation" and "changed circumstances" can be two such subcategories of "good cause." Cf. Brickey, 714 P.2d at 646-48.

Id. at ¶ 16. The court of appeals thus departs from Brickey by nullifying an innocent miscalculation as a subcategory of good cause. That is, Morgan imposes a narrow requirement that, in order to establish an innocent miscalculation, the State must in every case produce new or previously unavailable evidence that it could not have reasonably discovered earlier. Morgan's linkage of an "innocent miscalculation" with "new or previously unavailable evidence" in effect subsumes the former category in the latter, since the opinion precludes establishing an innocent miscalculation without a showing of new or previously unavailable evidence.<sup>18</sup>

Morgan's modification of the Brickey rule is flawed by its disregard for the due process concerns at the heart of Brickey. That is, it would prohibit the State from refiling criminal charges under circumstances that do not violate - or even implicate - the due process rights of defendants. Morgan would thus unnecessarily impair both the State's ability and obligation to pursue well-founded criminal prosecutions without protecting any legitimate due process interests of defendants.

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<sup>18</sup> At least one other panel of the court of appeals has explicitly relied upon the "other good cause" prong of Brickey, finding that charges could be refiled, even though there was no suggestion in that case that new evidence had been uncovered. See State v. Rivera, 871 P.2d 1023, 1025 (Utah App. 1994), rev'd on other grounds, 906 P.2d 311 (Utah 1995) (finding that the State could refile the case if a bindover were reversed for lack of evidence and quoting Brickey as indicating that an innocent miscalculation of the evidence required for a bindover constitutes good cause for refiling).

This case provides a compelling example. Here, an archaeologist testified at the first preliminary hearing. No one disputes that this witness possessed the necessary substantive knowledge to fill the evidentiary gap identified eleven months later by the court of appeals. The case, therefore, does not involve new or previously unavailable evidence. Rather, it involves a witness "whose testimony is known at the time and does not change in any material way after the initial bindover is dismissed." Morgan, 2000 UT App. 48 ¶15. According to Morgan's interpretation of Brickey, however, refiling would not be permitted in this case because the State's innocent miscalculation of the evidence required for a bindover was not coupled with the discovery of new or previously unavailable evidence. Id. at ¶16.

Under Morgan's restrictive interpretation of Brickey, defendants are permitted to wield Brickey as a sword simply because the prosecutor - to say nothing of defendants and the magistrate - reasonably construed the statute differently than the court of appeals ultimately did. If refiling is not permitted and Morgan's interpretation of Brickey prevails, defendants will be allowed to escape prosecution on charges for which the State plainly had sufficient evidence for at least a bindover. See State v. Talbot, 972 P.2d 435, 437-38 (Utah 1998) (clarifying that the bindover standard is lower even than

civil preponderance of evidence standard) (citation omitted). Ratifying the court of appeals' broad preclusion of refiling fundamentally undermines the Brickey rule by extending it to situations that do not implicate a defendant's right to due process. Such an interpretation plainly decreases confidence in the judicial system, in clear contravention of Brickey. See Brickey, 714 P.2d at 646 (promotion of confidence in justice system is by-product of preliminary hearing function of ferreting out groundless claims).

**c. Fisk: A Better Model**

The district court in this case would have been better served by reference to State v. Fisk, 966 P.2d 860 (Utah App. 1998), a factually analogous case articulating a more comprehensive Brickey analysis.<sup>19</sup> In Fisk, after a preliminary hearing, charges were dismissed for insufficient evidence on one element of the offense. Fisk, 966 P.2d at 862. Subsequently, a key witness testified at another proceeding which, in turn, gave rise to expert testimony addressing the missing element. Id. The court permitted refiling in Fisk, reasoning that the intervening event of the witness testifying at the other proceeding created "new evidence" and thus constituted good cause

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<sup>19</sup> While Fisk was actually decided on jurisdictional grounds, the opinion nonetheless addresses refiling under Brickey. Fisk, 966 P.2d at 863-64. Although dictum, the discussion remains instructive as an illustrative factual example.

justifying refiling. Id. at 864. The court also carefully examined the impact of refiling on defendant's right to due process. Reviewing the Brickey rule, the court noted that "no evidence in the record suggest[ed] that the State refiled the charges with the intent of harassing defendant" and that the State made "diligent efforts" to ensure that the second preliminary hearing was conducted by the judge who presided over the first. Id. Under such circumstances, Brickey presented no bar to refiling.

Similarly, here, Brickey presents no bar to refiling. Rather than the intervention of "new evidence," as in Fisk, this case presents a "changed circumstance" in the form of newly-articulated appellate law. Both function as "good cause" justifying refiling. Also, just as in Fisk, the record in this case is devoid of even a shred of evidence suggesting prosecutorial abuse or overreaching. Thus, applying the Brickey analysis utilized in Fisk, refiling is also permitted in this case.

Where defendant's due process rights are not implicated, a change in circumstances - in this case, the articulation of new law by an appellate court - provides ample support for refiling. To disallow refiling under the circumstances present here, as the district court noted in its ruling dismissing the case, is "unduly restrictive on the prosecution." Case #2: 154 or

addendum E. The injustice in such a result is especially clear because, where the State has neither engaged in forum-shopping nor withheld evidence in bad faith, defendants' due process rights as protected in Brickey have plainly not been violated.

CONCLUSION

For the reasons stated, this Court should reverse the district court order dismissing all charges against defendants and remand the case for trial.

RESPECTFULLY submitted this 20<sup>th</sup> day of October, 2000.

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IN THE UTAH SUPREME COURT

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STATE OF UTAH, :  
Plaintiff/Appellant, :  
v. : Case No. 20000556-CA  
JAMES REDD and JEANNE REDD, : Priority No. 2  
Defendant/Appellees :

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BRIEF OF APPELLEES

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STATE'S APPEAL FROM DISMISSAL OF AN INFORMATION CHARGING TWO ALTERNATIVE COUNTS OF ABUSE OR DESECRATION OF A DEAD HUMAN BODY, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. SECTION 76-9-704 (1996), IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR SAN JUAN COUNTY, THE HONORABLE MARY L. MANLEY, PRESIDING

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IN THE UTAH SUPREME COURT

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STATE OF UTAH, :  
Plaintiff/Appellant, :  
v. : Case No. 20000556-CA  
JAMES REDD and JEANNE REDD, : Priority No. 2  
Defendant/Appellees :

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BRIEF OF APPELLEES

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JURISDICTION AND NATURE OF PROCEEDINGS

The State has instituted its third appeal in this matter, seeking to overturn the Trial Court's dismissal of the felony charges, and to overturn the Court of Appeal's decision in State v. Morgan, 997 P.2d 910, cert. granted 4 P.3d 1289 (Utah 2000). This matter is before this Court pursuant to a certification by the Court of Appeals under Utah Rules of Appellate Procedure Rule 43(a).

STATEMENT OF THE ISSUE ON APPEAL AND  
STANDARD OF APPELLATE REVIEW

Was the District Court correct in its dismissal of the refiled felony counts, based upon State v. Brickey, 714 P.2d 644 (Utah 1986) and State v. Morgan, 997 P.2d 910, cert. granted, 4 P.3d 1989 (Utah 2000)?

The standard of review is one of correctness and clearly erroneous. For statutory interpretation, the correctness standard applies; State v. Larsen, 865 P.2d 1355 (Utah 1993); however,

findings of fact shall not be set aside unless clearly erroneous. Rule 52, Utah Rules of Civil Procedure, Rule 26(7) of the Utah Rules of Criminal Procedure and State v. Walker, 743 P.2d 191 (Utah 1987).

#### CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Ann 76-9-704 (1996) is at the core of the felony charges; however, this appeal involves the clearly erroneous standard of factual findings and case law interpretation of Brickey, supra, and Morgan, supra.

#### STATEMENT OF THE CASE

Over four years ago, the defendants were charged with a felony arising from an incident on January 6, 1996. The lower Court has dismissed all or part of the charges three times. The government first appealed to the Utah Court of Appeals, lost, sought rehearing, lost, refiled more charges, lost half of those, appealed to the Court of Appeals, who certified the case because the instant issue was obviously destined for this Supreme Court. The government fought the certification and, ultimately, the matter was remanded to the lower Court who dismissed charges a third time. The government appealed a third time, this time reversing its previous position and seeking certification. The appellees did not resist certification.

The third dismissal was premised upon the only decision in this State defining "good cause," State v. Morgan, supra. Therein the clear, simple ruling is that "Evidence or witnesses previously known, available and unrepresented by the prosecutor without

justification do not constitute good cause." Morgan, supra, p. 912. The instant case has precisely that fact pattern such that unless Morgan is overturned, this is a frivolous appeal.

The government, despite three dismissals, three appeals, four years of litigation, and the clear controlling ruling of Morgan, as well as State v. Brickey, 714 P.2d 644 (Utah 1986), argues there has been no prosecutorial abuse and Mr. and Mrs. Redd's right to due process is not implicated.

#### STATEMENT OF THE FACTS

The government sets forth some of the testimony elicited at the two Preliminary Hearings. The key focus is their argument regarding the initially omitted but available testimony that "Ethnographic sources [say]:

that very often burials take place in that midden area, because, first of all, it's easy to dig and especially with punitive tools ... areas that are soft and easy to dig are very often the places - of repose for - humans. The second part being that very often deaths, of course, take place in the winter time when lots of the available ground is frozen and even harder to dig, so those soft areas in the midden are very much utilized as burials. Citing "Case #2; Tr. 164; 9, 10".

Omitted by the State in their recitation of facts are the

following questions by counsel for the defendants and answers by their expert:

Q. But, there was nothing here of a grave good nature, is that correct?

A. No, not that I saw.

Q. Okay, now, as I understand it, you concluded this was a grave because the bones were nearby, period?

A. That and the very frequent association of burials, of graves in the midden area.

Q. Okay. But that is a generic statement for the Southwest; is that correct?

A. That would be correct; yes.

Q. Has nothing to do with this particular spot because there's no grave goods in order for you to tell what went on there?

A. Except to say it is in the Southwest, yeah.

skipping a few lines-

Q. Do you even know if this is one versus five individuals with either a toe, a finger, an arm, that sort of thing?

A. No, we haven't analyzed the human remains to that extent. ....

Case #2; Tr. pages 16-17. (emphasis of underlining added)

This Court, in State v. Redd, 992 P.2d 986, 991 (1999), appropriately addressed "the broader public policy our interpretation advances" and, through footnotes, referenced to articles from the Salt Lake Tribune and Deseret News, regarding older burial sites. Factually, in the instant case, the transcript of the government's expert points distinctly away from a burial site and by admission the generalities have no connection to the instant case other than the fact the situs is in the Southwestern United States. The Salt Lake Tribune, December 10, 1998 "Cannibals of the Corners"; Ogden Standard-Examiner, September 7, 2000, "Tests show cannibalism among ancient Anasazi Indians"; The Denver Post, September 7, 2000, "Indian Cannibal Evidence Surfaces"; and Denver Rocky Mountain News, September 7, 2000, Associated Press, finds "Cannibalism Evidence At Anasazi Site"; all show, factually, an equal if not greater explanation as to what occurred in the instant case. There simply is a void of evidence supporting a burial and a plethora of alternative explanations, including cannibalism.

#### SUMMARY OF ARGUMENT

The government and defendants agree that the focus of this appeal is the viability of the refiled felony charges in the instant case.

Clearly the government had the power, as set forth in the footnote of the Court of Appeals decision denying rehearing, to refile the charges. The question is whether the holdings of State v. Brickey, 714 P.2d 644 (Utah 1986) and State v. Morgan, 997 P.2d 910, cert. granted, 4 P.3d 1289 (Utah 2000), combine to mandate the

dismissal of the newly filed charges.

The government concedes, at page 13 of their opening brief, that "... the instant case does not involve new or previously unavailable evidence ...?"

The government argues that "Specifically, where the State innocently miscalculated the amount of evidence necessary for a bindover, and where a changed circumstance - the articulation of new law by an appellate court - arose directly from the dismissal, and where defendants' due process rights are not implicated, neither the Brickey rule nor the due process rationale underlying it present a bar to refiling."

The defendants respond that there is no bar to refiling, but rather a bar to proceeding in lieu of "other good cause" and that "other good cause" does not include "evidence or witnesses previously known, available and unrepresented by the prosecutor without justification." Morgan, supra, p. 912.

The government rests its argument as to good cause to refile, on page 16 of their brief, upon an excerpt of a footnote in Brickey, which refers to Harper v. Dist. Ct., 484 P.2d 891 (Okla. 1971). The language quoted by the State, which is the water upon which the government's theory floats, is "when a prosecutor innocently miscalculates the quantum of evidence required to obtain a bindover." However, materially and painfully harmful for the government's position, is the missing preceding language in the partially quoted footnote - "holding that good cause to continue a preliminary hearing for further investigation might exist ...."

(emphasis added) There is more. Contrary to the quote on page 16 of the government's brief, their vaunted quote not only has a beginning which sets it apart from this case, it also has an end which qualifies it as being different from this case. That ending language, after the word "bindover" is ... and further investigation clearly would not be dilatory." (emphasis added) The operative language of Harper, supra, 895, is that to allow the prosecutor unbridled discretion to refile dismissed charges "tends to make a mockery of the meaning of 'due process of law' and appears to place the District Attorney in a dictatorial position, in relation to the judiciary."

The government also urges that "the articulation of new law by an appellate court" is a "changed circumstance" which permits a sustaining of a refile. However, the statutory interpretation in State v. Redd, 954 P.2d 230 (Utah Ct. App. 1998), is not new law but a straight forward interpretation of an old law. The Court of Appeals went to great length in discussing statutory construction, citing Deland v. Uintah County, 945 P.2d 172 (Utah Ct. App. 1997); Nixon v. Salt Lake City Corp., 898 P.2d 265 (Utah 1995); State v. Scieszka, 897 P.2d 1224 (Utah Ct. App. 1995), and others in reaching its conclusion that the State must prove three elements - elements being defined in Webster's Third New International Dictionary, p. 734 as, among others, "one of the constitutional parts, principles, materials or traits of anything: one of the relatively simple forms or units that enter variously into a complex substance." Identification and enunciation of simple

elements cannot be labelled "articulation of new law," and there is neither statutory nor case law support for that premise.

Finally, the State argues that State v. Fisk, 966 P.2d 860 (Utah App. 1998) "represents a better model from which to seek guidance." Fisk is a case dismissed for lack of jurisdiction. It is also one that speaks to "new evidence" and specifically sets forth ... "we do not address defendants' arguments that the 'other good cause' prong of the Brickey test was not satisfied ..." Fisk, supra, p. 863. (emphasis added). The Fisk case shows evidence that the government developed their new evidence after a separate hearing in a separate forum. In the instant case, the record is void of any evidence as to why the government should be able to put the defendants through three dismissals and three appeals.

The key is Brickey language - "unless the prosecutor can show ... other good cause." Brickey, supra, p. 647. In the instant case, the prosecutor has tendered nothing while the Attorney General's Office seeks to shift the burden to the defense. It is not the burden of the defense to prove a negative. It is the burden of the prosecutor to prove "other good cause."

Brickey prohibits a continuation of these charges. Morgan prohibits a continuation of these charges. Due process and common sense prohibit a continuation of these charges.

#### ARGUMENT

#### THE DISTRICT COURT WAS CORRECT IN ITS THIRD DISMISSAL OF FELONY CHARGES

Addendum F of the government's brief contains a reproduction of the Order by the Trial Court sought by the appellant to be

overturned.

That Order contains the following factual finding by the Trial Court, labelling as "accurate observation" the magistrate's findings:

Brickey does suggest that a prosecutor's initial miscalculation of the quantum of evidence might justify refiling. Here, however, it is not the quantum of evidence that was miscalculated, but the nature of the evidence. The State did not fail to present enough evidence on March 20, 1997, to prove a dead body had been buried; it presented none. (emphasis added) (Addendum F, p. 2)

The Court then went on to hold, legally:

Lack of new evidence and innocent miscalculation as to the evidence required to obtain a bindover are the two areas that Brickey and Morgan together set forth as insufficient grounds to permit a refiling of charges after dismissal. It is those very claims that the State sets forth in this case. While the practical application of these cases may be unduly restrictive on the prosecution, in light of Brickey and Morgan, this Court is

compelled to grant the defendants' motion.

State v. Brickey, supra, was a case of first impression in Utah: what are the limits on the state's ability to refile criminal charges when those charges have been previously dismissed for insufficient evidence? The Utah Supreme Court found that the State is not free to refile criminal charges under all circumstances. "For if this were the case, the State could easily harass defendants by refiling criminal charges which had previously been dismissed for insufficient evidence. Consideration of fundamental fairness preclude vesting the State with such unbridled discretion." Brickey, supra, p. 647.

Thus, implicitly, continuing to pursue refiled criminal charges which have been previously dismissed for insufficient evidence is harassment unless there is an exception to the rule. In the instant case, the factual finding, viewed under the clearly erroneous standard is that the State produced no evidence to prove a basic element. Thus, the factual rule in this case is that the State failed to go forward both as to a key element and failed to offer any explanation or "other good cause."

The Utah Supreme Court then went on to "find merit in the approach taken by the Oklahoma courts." Brickey, supra, 647. The case followed by Utah is Jones v. State, 481 P.2d 169 (Okla. Crim. App. 1971). In Jones, the prosecutor must show that new or previously unavailable evidence has surfaced or that other good cause justifies refiling. The burden is on the prosecutor. In the instant case, contrary to State v. Fisk, 966 P.2d 860 (Utah App.

1998), the prosecutor has not introduced a scintilla of evidence of his good faith, leaving open all options, including the possibility that this refiling is politically driven by the government, not the prosecutor, by the huge amount of press and not by the principles of due process. At the lowest base fact, there is a void of effort by the prosecutor to produce evidence of "other good cause," contrary to the mandate of Jones, supra, and this Supreme Court in Brickey, as well as demonstrated in Fisk, supra.

In Brickey, which adopts the Jones rationale, the reviewing magistrate or Court must look "at the facts to determine whether the new evidence (none claimed by the prosecutor here) or changed circumstances (none argued by the prosecutor) are sufficient to require a re-examination and possible reversal of the earlier decision dismissing the charges." Brickey, supra, 647.

The appellant takes from context, a part of footnote 5 in Brickey. The case cited is Harper v. Dist. Ct., 484 P.2d 891 (1971), an Oklahoma case issued the same year, but after, Jones, supra. Harper involved a District Court interfering with a magistrate's decision as to a bindover of a preliminary hearing. Harper repeats the prohibition against another filing "unless the State makes an offer of additional evidence or proves other good cause to justify another preliminary examination." Harper, supra, 897. (emphasis added) Again, "In short, for good cause shown ..." Harper, supra, 897. Equally importantly, the footnote in Brickey, quoted by the State, refers to a continuance of a preliminary hearing when the prosecutor miscalculates the quantum of evidence,

and further investigation would not be dilatory - not to the refiling good cause that must be shown by the prosecutor.

State v. Morgan, supra, is a drug case, involving possession of methamphetamine with intent to distribute. At the preliminary hearing, the prosecutor chose to only call one witness, despite the availability of the second witness. There was a failure to show one element, intent to distribute. Morgan also repeats the clear error standard as to factual findings, citing State v. Parra, 972 P.2d 924 (Utah Ct. App. 1998) for the mandatory presumption that the factual findings underlying the determination as to due process violation are correct.

In Morgan, as well as Brickey, the prosecutor was prohibited from proceeding on the refiled charges. In Brickey, the prosecutor failed to introduce any evidence of an element of the forcible sexual assault. In the instant case, the factual finding is the same - the prosecutor failed to introduce any evidence of an element of the charge. In Morgan, the testimony of the second witness "contained no suggestion of new or previously unavailable evidence." Morgan, supra, p. 912. Such is uncontested in the instant case.

Morgan repeats the mandate - there is a prohibition "unless the prosecutor can show that either (1) new or previously unavailable evidence has surfaced, or (2) that other good cause exists to justify refileing." Morgan, supra, 912. (emphasis added) Clearly the burden is on the prosecutor. In the instant case, there was no attempt, no scintilla of evidence produced by the

prosecutor.

The holding in Morgan, supra, 917, is "Other good cause, as described in Brickey, must at a minimum, be something beyond the introduction of a witness who was present in the courtroom, sworn, and ready to testify at the first preliminary hearing, whose testimony is known at the time and does not change in any material way after the initial bindover is dismissed." "Evidence or witnesses previously known, available and unrepresented by the prosecutor without justification do not constitute good cause." Morgan, supra, p. 913.

In the instant case, the government's expert, Dale Davidson, was called at the first hearing, which resulted in the dismissal and recalled at the second hearing "for some additional issues." Case #2, Tr., p. 5. Parenthetically, there was a stipulation that the vehicle of the looters seen at the scene earlier in the fall was not that of the defendants. Case #2, Tr., p. 6-7. Nowhere in the transcript of the second hearing does the prosecutor proffer even an excuse, much less a scintilla of evidence as is mandated by Jones, Harper, Brickey, Morgan, and demonstrated in Fisk, that the new Davidson testimony was somehow unavailable previously.

The appellant argues, using an extraction of Fisk, that, on page 17, the Brickey rule "ensures that the defendant is not harassed by repeated charges on tenuous grounds." In the instant case, the testimony by the government witness is that "there was nothing here of a grave good nature, ... is that correct?" Answer, "No, not that I saw." Case #2, Tr. p. 16. His clear testimony is

that he only concluded this was a grave (a place of intentional interment) because of the bones nearby and the frequent association of burials, of graves in the midden area. But, this "is a generic statement for the Southwest, is that correct? That would be correct, yes." Case #2, Tr. p. 17.

How more tenuous can the evidence be of interment than "a generic statement" of the entire Southwestern region of the United States? There are no grave goods - a void of evidence of a grave. More importantly, science now sees ample evidence of cannibalism among the Anasazi (as set forth in the Summary of Argument). The unalterable fact is that this was not a grave.

The premise of Brickey is that it is harassing to refile criminal charges when they have been dismissed for insufficient evidence. ONLY when the prosecutor can show, can prove, "other good cause," can the harassment be overcome. With a void of effort in the transcript, there is nothing that argument can substitute, for argument is just that - argument. The evidence is in the transcript - or, in this case, the lack of evidence or effort. One has but to read Fisk, to see enormous distinctions with a difference in the position of the prosecutors in Fisk versus the instant case.

The government poses the argument that at the first hearing, neither the Court nor the defense addressed the missing element. Thankfully our system is one of an adversarial nature. It is the prosecutor's burden, light that it is, to put on some evidence of the basic elements. As the Trial Court observed and as quoted

already from appellant's Addendum F, p. 2, the State did not fail to present enough evidence on March 20, 1997, to prove a dead body had been buried, it presented none. (emphasis added)

The State persists in arguing that unless there is forum-shopping or purposeful obfuscation of evidence through sandbagging, there is no harassment. That is NOT the premise of Brickey and that is not the reality of two Utah citizens and their five children who have endured, economically and emotionally, three government appeals and repeated filings.

The State, using repeated metaphors of ships - "adrift," "anchor," "casts a net," argues that Morgan undermines the essential guiding principle of the Brickey rule. The State seeks solace in its appellation of "Brickey's suggestion" that an innocent miscalculation of the quantum of evidence necessary for a bindover may in and of itself suffice as "another subcategory" of "good cause." The simple fact is that this is a Court of law, not a Court of "suggestions." The simple fact is that the State ignores the mandate that the prosecutor must prove good cause - and such was not even argued at the hearing. Even their argument, on page 25, is that "the State plainly had sufficient evidence for at least a bindover." (emphasis added) Hopefully the State is never the recipient of such an unrelenting assault. "at least a bindover?" Such statement epitomizes the refiling of a tenuous case!

The ship of the State floats upon the premise that when the prosecutor innocently miscalculates the quantum of evidence

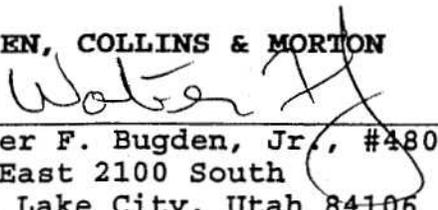
necessary for a bindover, they are able to attack again. This subjective argument is supported by nothing. In Fisk, the entire history of the case was presented. Not so here. The factual finding of no evidence stands. It is equally possible that the driving force for the refiling is NOT the prosecutor, for there is no record of why this all occurred. Fisk hurts the State by showing steps taken by the State as to new evidence versus the void in the instant case. Brickey and Morgan torpedo the ship of the State.

#### CONCLUSION

The facts as found by the Court, the law of Jones, Harper, Brickey, and Morgan, due process, and common sense, join together to overwhelm the void of effort of the prosecutor to show "other good cause." This is not an Empty Grave, it is NOT a grave. Generic statements are insufficient to subject Utah citizens to the rigors of trial on a case described by the State's best advocate as "at least a bindover." Failing to put on any evidence of a basic element is not "good cause." Morgan is good law. The facts here are undisputed. The Trial Court's dismissal should not be overturned!

Respectfully submitted,

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# Current Issues in Archeological Protection for the Department of Justice

*The statement that follows was presented to the Interagency Archeological Protection Working Group (IAPWG) on February 7, 1994, by Jo Ann Harris, Assistant Attorney General, Criminal Division, United States Department of Justice. IAPWG is an informal headquarters-level organization representing federal agency chief law enforcement officers, departmental solicitors, and the appropriate divisions with the Department of Justice. IAPWG meets periodically to exchange information, identify needs, and implement programs and actions to improve archeological resources protection nationwide. This recent IAPWG meeting was held in the National Park Service Director's Conference Room at the Department of the Interior, and Ms. Harris was introduced by Jerry Rogers, Associate Director for Cultural Resources, National Park Service.*

Thank you, Mr. Rogers, for your very gracious remarks. It is my pleasure to provide some brief comments on an area in which I have both a professional and personal interest—"Current issues in archeological protection for the Department of Justice." Indeed, this is probably the first time ever that the Assistant Attorney General for the Criminal Division has a history of literally digging in the dirt with a bunch of wonderful archeologists both in the United States and the far reaches of Siberia. My interest: Prehistoric North America.

This is an exciting time for all of us who are concerned about the protection of the richly varied archeological resources which constitute part of the treasure of our history and pre-history in the United States.

Since the enactment of the Archeological Resources Protection Act of 1979 (ARPA), 16 U.S.C. § 470aa et seq., and the recent enactment of the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA), a portion of which is codified as the Illegal Trafficking in Native American Human Remains and Cultural Items Act, 18 U.S.C. § 1170, we now have tools which, if utilized properly—in a criminal, civil or administrative context—or some combination thereof, can be an effective deterrent in preventing further destruction of our archeological and cultural resources.

On January 18, 1994, the United States Supreme Court denied certiorari in an important case construing a key provision of the Archeological Resources Protection Act. In *United States v. Gerber*<sup>1</sup>, Judge Posner of the Seventh Circuit Court of Appeals held, for a unanimous court, that section 470ee(c) of ARPA was not limited to archeological objects removed from federal and Indian lands but that it also applied, in certain circumstances, to the removal of archeological resources from private property without the owner's permission. In *Gerber* the "Indian relic" predators, without permission, entered upon land in Indiana owned by the General Electric Company and,

(Harris—continued on page 34)

(Harris—continued from page 33)

in a manner that constituted criminal conversion and criminal trespass under Indiana state law, excavated and removed numerous prehistoric artifacts from an ancient burial mound affiliated with the "Hopewell phenomenon" culture. This "GE Mound" in southwestern Indiana was one of the five largest Hopewell burial mounds known. Gerber and his cohorts tore it apart. The case was successfully prosecuted by the United States Attorney's Office for the Southern District of Indiana.

As Assistant Attorney General, Criminal Division, Department of Justice, Jo Ann Harris leads a Division of 400 Federal prosecutors and lawyers charged with enforcing the nation's criminal laws and formulating national law enforcement policy.

Prior to her nomination in the Fall of 1993 to head the Criminal Division, Jo Ann Harris was a Manhattan-based sole practitioner with a Federal practice specializing in white collar crime. Before entering private practice in 1983, she was a Federal prosecutor in the Southern District of New York, first as an Assistant United States Attorney, then as Deputy Chief of the Criminal Division, and finally as Executive Assistant United States Attorney. Between 1979 and 1981, she was based in Washington as Chief of the Fraud Section, Criminal Division at the Department of Justice.

Jo Ann Harris has served on three Independent Counsel staffs in connection with the Washington-based investigation of corruption at the Department of Housing and Urban Development during the 1980s, the 1990 investigation of New York Mayor David Dinkins, and the 1985 investigation of the Charles Point Resource Recovery Facility in Westchester County, New York.

Ms. Harris has been a teaching team leader and team member in a multitude of programs for the National Institute for Trial Advocacy (NITA), and in 1990 she was awarded the NITA Faculty Award "for inspiration, excellence and dedication for fourteen years of service in teaching advocacy skills." She also has held an appointment as Lecturer at Harvard Law School, and has taught Trial Skills at numerous law schools including Emory, Fordham, New York University, Pace, and Hofstra. During 1992-1993, Ms. Harris held an appointment as Visiting Professor and Director of Trial Advocacy at Pace University. She also was a member of the Board of Pace University's Battered Women's Justice Center and has led teams of lawyers teaching young lawyers how to represent battered women in court.

Jo Ann Harris maintains an intense interest in archeology and prehistory. She has been an active member of the Center for the Study of the First Americans for several years, as well as serving on its Advisory Board, and has been a participant in formal archeological excavations at the Mammoth Meadow site in southwestern Montana.

A report on the training course, "Overview of Archeological Protection Law," and Ms. Harris' presentation during that 16-hour interagency, intergovernmental program will be published in the Federal Archeology Report, volume 7, number 3, which will be available in early winter, 1994.

*Gerber*, in combination with *United States v. Austin*<sup>2</sup>, a decision of the Ninth Circuit Court of Appeals which upheld the constitutionality of ARPA, provides a sound legal basis for successful criminal prosecutions under ARPA. Given this current state of the law we see no sound legal reason for not prosecuting appropriate ARPA violations, even when they occur on private property.

### Investigations

Historically, almost all criminal ARPA offenses have been investigated by agents and archeologists employed by the federal agency that has responsibility over the land on which the unlawful excavation and removal occurred, with the Federal Bureau of Investigation being called in to assist, if requested, in major investigations or when no federal land managing agency has jurisdiction—as was the case in the *Gerber* prosecutions. Any subsequent federal prosecution is then pursued by the responsible United States Attorney's Office, with legal assistance provided, if requested, by attorneys with the Criminal Division of the Department of Justice.

### Prosecutions

A paramount interest of the Department of Justice is ensuring that there are sufficient Assistant United States Attorneys located throughout the country who are versed in the various technical requirements of ARPA and other criminal and civil provisions which can be used to prosecute archeological resource violations, such as the theft of government property statute [18 U.S.C. § 641] and the depredation of government property statute [18 U.S.C. §1361]. To this end, Department of Justice Criminal Division attorneys provide two on-going services and assist in a third.

#### 1. Inquiries

First, attorneys from the General Litigation and Legal Advice Section and the Asset Forfeiture Office are available to respond to any criminal and forfeiture matter inquiry by any Assistant United States Attorney or any attorney, investigator, archeologist or other employee of any federal agency involved with archeological protection enforcement activities.

#### 2. The Book

Second, in 1992, Criminal Division attorneys, in conjunction with the Archeological Assistance Division and other members of the Interagency Archeological Protection Working Group, prepared a two-volume loose-leaf publication entitled "Archeological Resources Protection: Federal Prosecution Sourcebook." This Sourcebook has been distributed to all 94 United States Attorney Offices plus all branch offices of the United States Attorneys. In addition, the Archeological Assistance Division has distributed the Sourcebook to a wide variety of agency attorneys, land managers, archeologists and criminal investigators along with officials with various Indian tribes. We feel that this Sourcebook, which is supplemented annually, is a valuable training tool which further educates its users and, we believe, eventually leads to more ARPA prosecutions.

#### 3. The Conference

Finally, Criminal Division attorneys, in association with the Archeological Assistance Division and the Executive Office of United States Attorneys of the Department of Justice, participate in the annual two-day conference on "Overview of Archeological Protection Law" co-sponsored by the Archeological Assistance Division and the Department of Justice. This conference has provided intensive training to over forty Assistant United States Attorneys in addition to a number of agency personnel and other individuals involved in the preservation of our rich archeological heritage.

Thank you for the chance to present these short remarks. I look forward to working with you to help protect our archeological resources.

#### Notes

<sup>1</sup> 999 F. 2d 1112 (7th Cir. 1993), cert. denied, 114 S. Ct. 878 (January 18, 1994). The lead defendant, Arthur Gerber, was sentenced in July 1992 to 12 months imprisonment followed by 3 years supervised release, in addition to a \$5,000 fine, a \$125 special assessment, and a \$4,750 forfeiture. Gerber was also ordered not to sell, purchase, barter, excavate any archeological resources, nor sponsor, organize, or attend any shows or exhibitions that have any archeological resources exhibited. Gerber commenced serving his imprisonment at the Fort Worth Federal Correctional Institution in May 1994. Gerber's four associates were all sentenced to 2 years probation with the condition that they serve specified periods of either work release or home detention ranging from 30 days to 180 days. Two of these associates were also fined \$2,000 and \$5,000. All of the defendants commenced serving their sentences in May 1994.

<sup>2</sup> 902 F. 2d 743 (9th Cir.), cert. denied, 498 U.S. 874 (1990).

# CRM

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# The Importance of Preserving Heritage Resources

*The text that follows is taken from an address that was presented to the "Overview of Archeological and Historic Resources Law" training course on June 12, 1996, by Elizabeth Osenbaugh, then Counselor for State and Local Environmental Affairs in the Environment and Natural Resources Division of the Department of Justice. These remarks underscore the commitment of the Environment and Natural Resources Division to archeological and historic resources, as well as items of ongoing historical, traditional, or cultural significance for a district, the nation, or a living culture.*

*"Overview of Archeological and Historic Resources Law" provides Federal departmental and agency counsel with information that enables them to interpret laws and regulations, clarify Federal responsibilities, articulate current policies, and complete casework relating to heritage resources. It is co-sponsored by the National Park Service and the Office of Legal Education, Executive Office of United States Attorneys, Department of Justice. The 1996 training was made possible, in part, with special funding by the National Park Service through its Preservation Partnerships Training Initiative.*

I am very pleased to be here today to express the Environment Division's commitment to protection of historic resources. This commitment is part of the Administration's overall dedication to preserving our historic and cultural heritage. As you may know, the President recently signed Executive Orders on locating federal facilities on historic properties (May 21, 1996) and protecting Native American access to sacred sites (May 24, 1996).

*Why is it important to protect archeological and historic resources?*

- Archeological and historic resources provide a sense of place. The Attorney General often discusses the environment in terms of the importance that a "special place" has for each of us. For her, it's the Florida Everglades; for me, it's the Iowa prairie. So, too, do buildings and cultural artifacts evoke the sense of home or a shared past, which provides that critical sense

of belonging to our community and to our country.

- Archeological and historic resources make prior experience meaningful and immediate—as the National Archives building proclaims, "What is past is prologue."

Actual contact with historic sites or documents illuminates that past with intensity. This contact in turn makes historic experiences real—and hopefully gives us meaningful information and wisdom as we develop and implement government policy.

- Archeological and historic resources help us understand the present and our role in the continuum of time—as William Faulkner said, "The past is never dead; it isn't even past."\* Further, like the monks illuminating manuscripts they could not read, we may serve as instruments to preserve these historical materials until they can be more fully understood.
- Archeological and historic resources provide a sense of local and national community—the terrible burnings of black churches in the South illustrate the significance of cultural, architectural, and community resources to a community. The buildings themselves are significant symbols of the communities, which we must protect from attack.
- By protecting resources that are special to the culture of a community, we show our respect for that community and preserve the diversity of the broader American culture.

*What can government lawyers do to protect these resources?*

- We can prosecute those who steal or destroy historic and cultural resources in violation of law. Yesterday's *Washington Post*, for example, contained a story about a man who allegedly visited libraries up and down the East Coast stealing maps and ancient documents. If true, this is theft of public property, which unlike money or computers, can never be replaced, once lost.
- We can educate the public. Much damage to archeological and historical sites may be caused by those who love history and want their "own piece of it." We need to educate the

public as well as relic hunters and other collectors to assure that there is understanding both of the existing laws and of the adverse impact amateurs can unknowingly cause.

- We can develop good agency records to support decisions that affect third parties and to assure that those decisions are reasonable and supported by the record.

When I was in the Iowa Attorney General's office, the state archeologist asked for assistance regarding the discovery of an ancient burial mound on a platted lot in a new subdivision.

The mound was discovered after a 60-acre farm had been subdivided into lots—and the lot in question had been sold for \$50,000. The state archeologist ordered the developer to leave the mound undisturbed. As the mound was in the center of this lot, the homeowner could not build a house on the lot. The developers bought the lot back from the buyer as required by their contract warranting that the land was fit for residential development. The developers notified the state it would claim entitlement to compensation for a "taking" of its property under the Fifth Amendment. However, the developers from the outset claimed they had no objections to the determination of the state archeologist that this was a historically significant mound and that nothing could be built on the mound without destroying it. Nonetheless, we wanted to be sure that there was a complete record supporting the land use restriction, in anticipation of the subsequent takings case. We assured that the record established the reasonableness of the agency action and that the developer's admissions, as well as other critical facts, were established in the record. Throughout the process, down to responding to statements in the *amicus* briefs in the United States Supreme Court, it was necessary to establish time and again that the decision to prohibit building was reasonable and not broader than necessary.

The trial court and the Iowa Supreme Court held that the state archeologist's refusal to permit excavation and building on the burial mound was not a taking requiring the payment of compensation. *Hunziker v. State*, 519 N.W.2d 367 (Iowa 1994), cert denied, U.S. 115 S.Ct. 1313, 131 L.Ed. 2d 195 (1995). The court concluded that the developers' "bundle of rights" never included the right to disinter the bones as the applicable statutes preceded the developers' purchase of the farm. The state had also argued that the developers never had a right to disrupt human graves at common law. The briefs clearly established that Iowa has protected graves since its days as a territory. That common law and the Iowa Burial Protection Act of 1976 both pre-

dated the developer's purchase of the land—and certainly the mound itself long pre-existed the developer's expectancies. Because the developer never had the right to excavate and destroy the mound, its discovery and the consequent decision of the state archeologist did not constitute a taking.

The Iowa Supreme Court also ruled that the loss of \$50,000 plus \$7,000 in refunded architectural fees was *de minimis*, considering that the developer purchased the 60 acres for approximately \$500,000 and received more than four million dollars for sale of the other 123 lots.

The developer filed a petition for *certiorari* with the United States Supreme Court. Several *amicus* briefs were filed by the Iowa Farm Bureau Federation, Mountain States Legal Foundation, Alliance for America, and National Association of Homebuilders. *Hunziker* was presented in conference at the Supreme Court three times before *certiorari* was denied. I believe *certiorari* was denied because the record was strong on the reasonableness of the decision, as well as on the strength of the legal authorities addressed by the Iowa Supreme Court.

- You who attend this seminar can provide expertise to other government lawyers and agency personnel. Often action to protect sites must be taken quickly—and often those bringing the action are not experts in archeological law or historic protection. It is important that the "general practitioners" in the offices of U.S. Attorneys, local prosecutors, and state attorneys general know whom to call for help as these cases arise. When we were working on *Hunziker* we happened to get seminar materials from the Park Service and got David Tarler's phone number. He was helpful in informing us of cases in other jurisdictions.

It is critical that government attorneys be versed in the laws designed to protect these non-renewable resources and to prevent the destruction and disruption of our heritage. Through courses such as this, it is my hope that you will all gain a familiarity with and an appreciation for preservation law so that you can use these important statutes to achieve their purposes.

#### *Role of the Environment Division*

Within the Department of Justice, much of the direct enforcement of criminal laws is handled by the United States Attorneys offices in the various districts. The Criminal Division provides assistance to assistant U.S. Attorneys as they develop these cases.

The Attorney General has also established an Office of Tribal Justice to coordinate departmental policy on matters affecting Indian tribes. We work closely with that office.

The Environment and Natural Resources Division (ENRD) handles civil cultural and historic resource cases at the national level. This is appropriate as these resources are integral to the environment that we strive to protect every day. The ENRD is very interested in working with federal land managers and the United States Attorneys' offices to explore appropriate cases for enforcement. Additionally, we work with agencies daily to ensure that federal agencies comply with preservation laws.

Our General Litigation Section has attorneys with expertise in such preservation laws as the Native American Graves Protection and Repatriation Act, otherwise known as NAGPRA, the Antiquities Act, the National Environmental Policy Act or NEPA, the Abandoned Shipwreck Act, and the National Historic Preservation Act. One of those attorneys, Caroline Zander, presented the "Nuts and Bolts of Archeological and Historic Resource Law" and a lecture on the Antiquities Act at this seminar. Federal, state, and local attorneys should feel free to call Caroline and others listed in the "contacts" list (see box).

The Indian Resources Section is largely devoted to the protection and promotion of tribal rights including resource rights. This Section is uniquely suited to handle violations that occur on Indian lands, including violation of historic and archeological preservation statutes. ENRD, along with Justice's Office of Tribal Justice, will be the key coordinators on the sacred sites executive order.

Our Land Acquisition Section is sometimes called upon to condemn properties being acquired for their historic significance. It has, for example filed condemnation actions to acquire lands for inclusion in the Antietam National Battlefield and the Lowell National Historical Park.

The Division's Policy, Legislation, and Special Litigation Section, or PLSL as it is more commonly known, plays a key role in coordinating

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policy within the Division and with other federal agencies. PLSL works closely with the Department's Office of Tribal Justice on all matters implicating Indian Tribes and their resources. The Indian Resources Section's Senior Counsel Kalyn Free is also working to improve federal/tribal coordination of environmental enforcement issues in Indian Country. The Division welcomes your calls to discuss potential litigation or policy issues.

#### **Note**

\* William Faulkner, *Requiem for a Nun*.

*Elizabeth Osenbaugh currently is Solicitor General of the State of Iowa. She coordinates civil appeals and official opinions of the Attorney General.*

*Judy Rabinowitz is an attorney at the Department of Justice. She works in the Policy, Legislation, and Special Litigation Section of the Environment and Natural Resources Division.*

Developments in Federal  
and State Law

# ENVIRONMENTAL LAW IN NEW YORK

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## Protection of Native American Burial Sites: Opportunities for State/Tribal Cooperation

by Christopher A. Amato  
Office of the Attorney General of the State of New York  
Environmental Protection Bureau

### I. INTRODUCTION

Native American burial sites in New York State are subject to increasing pressure from a variety of sources. Commercial and residential development undertaken without adequate assessment of potential impacts on cultural resources,<sup>1</sup> looting by commercial and recreational artifact hunters,<sup>2</sup> and dubious excavations performed under the guise of scientific inquiry<sup>3</sup> have contributed to the increasing incidence of grave desecration and destruction. Accidental disturbance of burial sites is also common. Although there are well over one thousand known or suspected Native American burial sites in New York,<sup>4</sup> the vast majority are unmarked, making the inadvertent disturbance of such sites likely. Unfortunately, marked burial sites do not fare much better, becoming targets for relic hunters.<sup>5</sup> The recent upsurge in disturbance of burial sites<sup>6</sup> has resulted in Native American communities taking a more active role in protection of these sites. For example, in 1988, six New York Indian nations formed a Standing Committee on Burial Rules and Regulations to represent their interests on burial site issues at both the state and federal levels.<sup>7</sup> In addition, the past few years have witnessed an increased willingness on the part of New York's Native American communities to seek judicial intervention in burial site disputes.<sup>8</sup> At the same time, Indian nations have sought greater State involvement in efforts to protect grave sites. Although the State has a clear interest in protecting many

of these sites due to their historical significance,<sup>9</sup> existing State laws provide little recourse in most cases involving disturbance of burial sites.

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## UPCOMING EVENTS

*April 23, 2001*

"Global Warming: Out of the Frying Pan?" sponsored by the New York City Bar Association. Information: (212) 382-6700 or <<http://www.abcny.org>>.

*June 14-15, 2001*

"Environmental Insurance Forum," sponsored by the Society of Environmental Insurance Professionals. New York City. Information: 1-877-735-0800 or <<http://www.armr.net>>.

*July 24-27, 2001*

"Increasing Productivity Through Energy Efficiency," sponsored by the American Council for an Energy-Efficient Economy. Tarrytown, New York. Information: Rebecca Lunetta, (302) 292-3966.

## WORTH READING

Richard M. Gardella, "Free Speech and Civility: A View of Public Meeting Participation -Part II," *Municipal Lawyer* (Nov./Dec. 2000).

David Green, "Medical Monitoring: The Need for One Standard," *The New York Environmental Lawyer* (New York State Bar Association, Fall 2000), p. 16.

David L. Markell, "The Commission for Environmental Cooperation's Citizen Submission Process," *The New York Environmental Lawyer* (New York State Bar Association, Fall 2000), p. 26.

Daniel Montlucon and Sergio A. Sanudo-Wilhelmy, "Influence of Net Groundwater Discharge on the Chemical Composition of a Coastal Environment: Flanders Bay, Long Island, New York," *35 Environmental Science & Technology* 480 (2001).

Paul Post, "Playing With Power: How Will New York Satisfy Growing Energy Demands With a Static Supply?" *Empire State Report*, Jan. 2001, p. 29.

Seth B. Schafner, "Scope of Absolute Pollution Exclusion Clause—New York Court of Appeals Joins Debate on Applicability to Cases of 'Non-Environmental' Pollution," *New York Law Journal*, Jan. 8, 2001, p. 7.

Irene C. Warshauer, "Assessing 'Sick Buildings' Insurance Coverage," *New York Law Journal*, Jan. 16, 2001, p. r7.

## Protection of Native American Burial Sites: Opportunities for State/Tribal Cooperation

(continued from page 65)

Recently, however, the State and two New York Indian nations undertook a joint effort to protect a historically significant Native American burial site. An archaeologist, working under the auspices of a local college, excavated human remains and cultural artifacts from a burial site located near Buffalo, New York without consulting either State or Native American authorities. Following a joint investigation, the State and the two Indian nations filed a complaint against the archaeologist and the college under the federal Native American Graves Protection and Repatriation Act (NAGPRA).<sup>10</sup> The case was significant because it marked the first time that a state joined with Indian nation plaintiffs in an action under NAGPRA.

This article discusses the State/tribal cooperation that resulted in the filing of this novel litigation, and describes the case and its outcome. In order to place the litigation in context, the article begins with a brief description of New York's Indian nations and their cultural perspective on burial site issues, reviews existing provisions for burial site protections in New York, and provides an overview of NAGPRA. The article concludes with a discussion of opportunities for continuing cooperation between the State and Indian nations in protecting Native American burial sites.

### II. Indian Nations in New York

#### A. The Six Nations, or Haudenosaunee

There are seven Indian nations in New York that are recognized by the federal government:<sup>11</sup> the St. Regis Band of Mohawk Indians (also known as the St. Regis Mohawk Tribe), the Oneida Nation, the Onondaga Nation, the Cayuga Nation, the Seneca Nation, the Tonawanda Band of Seneca Indians (also known as the Tonawanda Seneca Nation), and the Tuscarora Nation.<sup>12</sup> As a group, these nations are commonly referred to as the Iroquois Confederacy<sup>13</sup> or the Six Nations,<sup>14</sup> but prefer to call themselves the *Haudenosaunee*, which means "People of the Longhouse."<sup>15</sup>

Six of the seven Haudenosaunee nations occupy reservations in northern and western New York.<sup>16</sup> These reservations range in size from approximately 30 acres (Oneida),<sup>17</sup> to approximately 14,000 acres (the Akwesasne reservation of the St. Regis Mohawk Tribe).<sup>18</sup> Despite the relatively small geographic territory they currently occupy, the historic control exercised by the Haudenosaunee over much of what is now New York State<sup>19</sup> means that Haudenosaunee burial sites may exist in many areas beyond current reservation boundaries.<sup>20</sup>

#### B. Other Indian Nations

Two other Indian nations, the Shinnecock and Poospatuck (Unkechaug), are recognized by New York State<sup>21</sup> but have

not been granted federal recognition. These nations reside on relatively small reservations on Long Island. As with the Haudenosaunee, the existence of burial sites beyond current reservation boundaries is likely, given that the area historically utilized by these tribes extended beyond those boundaries.

### C. The Haudenosaunee Perspective

In order to appreciate the dynamics of State/tribal cooperation on burial site issues, it is useful to understand the Haudenosaunee perspective regarding their relation to the State, and the cultural significance of burial sites to the Haudenosaunee.

The Haudenosaunee view of their relation to the State is influenced in large part by the *Gus-wen-tah*, or Two-Row Wampum,<sup>22</sup> which reflects one of the earliest treaties between the Haudenosaunee and the Dutch colonists.<sup>23</sup> The Two-Row Wampum, comprised of two equally spaced, parallel beaded rows running the length of the wampum, symbolizes the paths of two vessels traveling down a river:

One, a birch bark canoe, will be for the Indian people, their laws, their customs and their ways. The other, a ship, will be for the white people and their laws, their customs and their ways. We shall each travel the river together, side by side, but in our own boat. Neither of us will try to steer the other's vessel.<sup>24</sup>

The cooperative yet independent relation between the State and the Haudenosaunee symbolized by the Two-Row Wampum forms the core of the Haudenosaunee perspective on State/tribal relations.

Haudenosaunee traditions concerning death, burial and the afterlife are complex. The fundamental Haudenosaunee beliefs regarding the sanctity of the dead and their burial grounds have been stated as follows:

We have been taught that we bury our dead into the ground so that their bodies can become part of the sacred Earth. We believe that we come from the Mother Earth and that the human remains that rest within the Earth are an important spiritual connection to the spirit of the Earth. . . . The souls of the dead have a path of destiny that they must follow. We refer to this as their journey after life. . . . The protection of the human remains and associated graves, sacred burial sites and related objects from the graves of the Haudenosaunee are the responsibility of each generation of chiefs, clan mothers, and faithkeepers. We believe that the remains, the associated burial objects and the actual soil in which they rest is sacred . . . .

Removing the remains from their eternal resting place is a great desecration to both the dead and the living. The disturbance, destruction, and theft of the dead is a violation of the religious and spiritual welfare of the Haudenosaunee . . . . In the past, our ancestors buried many objects along with the body with the belief that in the afterlife, you will need all of those things that you need in this life. . . . The removal of these objects from the grave is a theft from the dead . . . .<sup>25</sup>

As discussed below, developing an understanding of these Haudenosaunee cultural perspectives laid the groundwork for successful collaboration in the NAGPRA litigation.

## III. Existing Burial Site Protections in New York

### A. General Statutory Provisions

New York's statutory protections for burial sites in general, and Native American sites in particular, are relatively meager.<sup>26</sup> A number of statutes authorize the excavation and reinterment of remains to accomplish various public purposes, such as maintenance of the State's canal system,<sup>27</sup> construction of public highways,<sup>28</sup> and natural gas exploration.<sup>29</sup> Other laws authorize the relocation of remains from abandoned cemeteries to properly maintained incorporated cemeteries.<sup>30</sup> One statute prohibits the sale of cemetery lands unless all remains have first been removed.<sup>31</sup> None of these laws, however, impose standards or provide for regulatory oversight of the exhumation and reinterment of remains.<sup>32</sup>

Only a handful of New York laws afford affirmative protection to burial sites. The Not-For-Profit Corporation Law (NPCL) requires consent of both the closest surviving relatives and the cemetery corporation before remains in cemeteries owned or operated by corporate entities may be disinterred.<sup>33</sup> In cases where such consent is lacking, disinterment may be permitted pursuant to court order,<sup>34</sup> but "good and substantial reasons" must be demonstrated before a court will order disinterment.<sup>35</sup>

The Education Law requires a permit issued by the Commissioner of Education for excavation or gathering of objects of archaeological or paleontological interest<sup>36</sup> on State lands.<sup>37</sup> The same law makes appropriation, excavation, injury or destruction of objects of archaeological or paleontological interest on State lands a misdemeanor.<sup>38</sup>

The Public Health Law makes it a felony to remove "the dead body of a human being, or any part thereof from a grave, vault or other place, where the same has been buried . . . without authority of law, with intent to sell the same, or for the purpose of dissection, or for the purpose of procuring a reward for the return of same, or from malice or wantonness."<sup>39</sup> A related provision<sup>40</sup> makes it a felony to open, without authority of law, a "grave or other place of interment, temporary or otherwise," for the purpose of removing remains or any items interred therewith, with the intent of stealing or selling such remains or items, or from malice or wantonness.<sup>41</sup>

None of these statutes are particularly useful in efforts to protect Native American burial sites. Most Native American burials are unmarked, and are not located in incorporated cemeteries, thus rendering them ineligible for the procedural protections of the NPCL. Moreover, because the majority of burial site disputes involve graves located on private lands,<sup>42</sup> the Education Law's permit requirement is of limited utility. The Public Health Law provisions are also limited because they require a showing of criminal intent, and may be applied only in circumstances when the excavation is undertaken "without

authority of law," a clause that could be broadly read to exclude many burial site incursions.<sup>43</sup>

### B. State Environmental Quality Review Act

The State Environmental Quality Review Act (SEQRA),<sup>44</sup> requires state and local agencies to prepare an environmental impact statement (EIS) for actions they undertake, fund or approve which may have a significant effect on the environment.<sup>45</sup> SEQRA defines "environment" to include, among other things, "objects of historic or aesthetic significance . . ."<sup>46</sup> Among the criteria considered indicators of significant adverse impacts on the environment (thus requiring preparation of an EIS) is "the impairment of the character or quality of important historical [or] archeological . . . resources . . ."<sup>47</sup>

An EIS must identify, *inter alia*, the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided should the proposed action be implemented, and mitigation measures proposed to minimize the environmental impact of the action.<sup>48</sup> Prior to undertaking, funding or approving an action that has been the subject of an EIS, the agency must make a specific finding that its chosen course of action, "consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize[s] or avoid[s] adverse environmental effects, including effects revealed in the [EIS] process."<sup>49</sup>

The protection afforded by SEQRA to historic sites has been inconsistent at best.<sup>50</sup> Although the proximity of a proposed project to a historical site has been held sufficient by some courts to require an increased level of environmental scrutiny,<sup>51</sup> other courts have reached the opposite conclusion. For example, a proposed project located wholly within a designated historic district was held not to require an EIS because the agency approving the project determined that its impacts on the district would be insignificant.<sup>52</sup> In another case, construction of a bridge adjacent to a historic site was held not to require an EIS on the ground that it qualified as a "replacement in kind" exempt from SEQRA's requirements.<sup>53</sup> In addition, several courts have declined to require a closer examination of a proposed project's impacts on historic property where such impacts were subject to factual dispute<sup>54</sup> or were claimed to be adequately mitigated.<sup>55</sup>

### C. State Historic Preservation Act

The State Historic Preservation Act (SHPA)<sup>56</sup> affords some limited protections to Native American burial sites that are listed, or eligible for listing, on the State Register of Historic Places ("State Register").<sup>57</sup> Prior to undertaking or funding a project, a state agency must consult with the Commissioner of the Office of Parks, Recreation and Historic Preservation (OPRHP) "if it appears that any aspect of the project may or will cause any change, beneficial or adverse, in the quality of any historic, architectural, archeological, or cultural property" that is listed or eligible for listing on the State Register.<sup>58</sup> Each agency is required to "fully explore all feasible and prudent plans which avoid or mitigate adverse impacts" on listed property.<sup>59</sup> In cases

where OPRHP determines that an undertaking will have an adverse impact on a property, it must provide the agency proposing the undertaking with recommendations for avoiding or mitigating such impacts.<sup>60</sup> Unless the agency abandons the project, it must give "thorough consideration" to OPRHP's recommendations and respond to them in writing.<sup>61</sup> If the agency disagrees with one of the OPRHP recommendations, it must include an alternative proposal which, in the agency's opinion, "would avoid or mitigate to the greatest extent possible the adverse impacts" identified by OPRHP.<sup>62</sup> The SHPA suffers from three serious limitations with respect to protection of Native American burial sites. First, undertakings by municipalities or by private individuals or entities are not subject to the review and mitigation requirements of the law if there is no state agency involved in the project. Second, although there is a general provision for public participation,<sup>63</sup> there is no requirement of notice to appropriate Indian tribes in the event the project at issue may affect Native American human remains or artifacts.<sup>64</sup> Third, SHPA imposes no obligation on an agency to follow OPRHP recommendations, or, for that matter, recommendations of tribal representatives who may comment on a proposed undertaking.

### D. Indian Law Section 12-a

The most pertinent and potentially useful state law protection for Native American burial sites is Section 12-a of the New York State Indian Law, which provides limited protections for any Native American burial site that has been designated as a place of historic interest by the OPRHP:

The [OPRHP] shall have the power to designate any Indian cemetery or burial ground as a place of historic interest, pursuant to subdivision one of section 3.09 of the parks and recreation law provided, however, that such cemetery or burial ground is not located upon any Indian reservation located wholly or partly within the state. *No person shall destroy, alter, convert, or in any way impair any such cemetery or burial ground which has been so designated as a place of historic interest or any artifact or other object thereon which is or may be of relevance to the historic interest thereof without the prior express written permission of the [OPRHP].*<sup>65</sup>

The statute also authorizes the Attorney General, at the request of OPRHP, to institute an action in Supreme Court to enjoin violations or threatened violations of its provisions.<sup>66</sup>

Section 12-a was specifically intended to protect historically significant burial sites located on private lands. The legislative memorandum accompanying the bill that was ultimately signed into law stated that the bill's purpose was to "prevent a repetition of the Gannagaro situation."<sup>67</sup> The reference is to a 17th century Seneca burial ground and village site located at Gannagaro, Ontario County, that was slated for purchase by the State as an historic site. Before the sale could be finalized, however, the owner leased the property to persons who excavated the site and looted the graves, removing human remains and artifacts.<sup>68</sup>

Despite its laudable purpose, Section 12-a has failed to afford

the broad protection to Native American burial sites that was apparently intended. Although it has been law for 30 years,<sup>69</sup> only one burial site has been formally designated by OPRHP as historically significant pursuant to Section 12-a.<sup>70</sup>

### E. The NYAC Standards

Some additional, albeit limited, protections for Native American burial sites are found in the "Standards for Cultural Resource Investigations and the Curation of Archaeological Collections in New York State" ("Standards") promulgated by the New York Archaeological Council (NYAC).<sup>71</sup> The NYAC Standards provide:

The discovery of human remains and items of cultural patrimony . . . in any phase of cultural resource investigations requires special consideration and care. . . . At all times human remains must be treated with the utmost dignity and respect. . . . Unless burial excavation is the purpose of or an explicit component of the approved research design, human remains should remain in situ until consultation with the project sponsor, the [State Historic Preservation Officer], federally recognized Native American groups, concerned parties, and involved state and federal agencies has taken place. The excavation, study, and disposition of human remains should take place in accordance with all applicable federal, state and local laws.<sup>72</sup>

In 1972, NYAC adopted a Burial Resolution,<sup>73</sup> urging a moratorium on the excavation of Native American remains, opposing the excavation of Native American burial sites for teaching purposes, and providing for reburial of inadvertently disturbed remains "in a manner and at a time prescribed by" the affected Native American community.<sup>74</sup> Although the NYAC Standards and the Burial Resolution (which remains in effect) represent a reasonable effort to address Native American concerns about disturbance of burial sites, neither is binding on New York archaeologists (or on archaeologists from other states working in New York) and they do not have the effect of law.

## IV. Overview of NAGPRA

Federal law provides some important protections to Native American burial sites, remains, and cultural artifacts. Chief among these is NAGPRA, a relatively comprehensive statute that regulates the excavation of burial sites located on federal and tribal lands, and acknowledges the interests of tribal communities in the preservation and return of items of cultural patrimony.<sup>75</sup>

As its legislative history makes clear, NAGPRA arose as a result of historical injustices in the collection and disposition of Native American remains and cultural objects:

Today thousands upon thousands of native American human remains and sacred objects are housed in museums and Federal agencies across the country. They are kept in boxes, crates, and small wooden file drawers, tagged and numbered. Many of these remains and sacred objects came from the all-too-common practice of digging Indian graves and using the contents for profit or to satisfy some morbid curiosity.<sup>76</sup>

NAGPRA "is, first and foremost, human rights legislation."<sup>77</sup> and is designed to redress and protect the "civil rights of America's first citizens."<sup>78</sup> It "establish[es] a process that provides the dignity and respect that our Nation's first citizens deserve,"<sup>79</sup> and, as stated by the Tenth Circuit, "safeguards the rights of Native Americans by protecting tribal burial sites and rights to items of cultural significance to Native Americans."<sup>80</sup>

NAGPRA effectuates its purposes first, by regulating the excavation of burial sites on federal and tribal lands, and second, by providing for repatriation of human remains and cultural artifacts to culturally affiliated Indian groups.<sup>81</sup> NAGPRA requires a federal permit for excavation of Native American human remains and cultural artifacts located on federal or tribal lands.<sup>82</sup> In addition, such remains and artifacts may be excavated only "after consultation with or, in the case of tribal lands, consent of the appropriate (if any) Indian tribe or Native Hawaiian organization."<sup>83</sup> In situations where Native American remains or artifacts are inadvertently discovered (rather than intentionally excavated) on federal or tribal lands, NAGPRA requires an immediate cessation of the activity that led to the discovery and written notification to the appropriate Indian tribe of such discovery.<sup>84</sup> Significantly, NAGPRA vests ownership or control of Native American human remains and artifacts excavated or discovered on federal or tribal lands in the lineal descendants of the interred Native American.<sup>85</sup>

The heart of NAGPRA is its repatriation provision, which is intended to redress the historic imbalance between scientific inquiry and Native American religious beliefs:

In light of the important role that death and burial rites play in Native American cultures, it is all the more offensive that the civil rights of American's first citizens have been so flagrantly violated for the past century. Even today, when supposedly great strides have been made to recognize the rights of Indians to recover the skeletal remains of their ancestors and to repossess items of sacred value or cultural patrimony, the wishes of Native Americans are often ignored by the scientific community. In cases where Native Americans have attempted to regain items that were inappropriately alienated from the tribe, they have often met with resistance from museums. . . .<sup>86</sup>

The framework for NAGPRA's repatriation provisions was provided by the 1990 *Report of the Panel for a National Dialogue on Museum/Native American Relations*.<sup>87</sup> Following the recommendations of the Panel,<sup>88</sup> NAGPRA sets out detailed procedures for the inventory and repatriation of human remains, funerary objects, sacred objects, and objects of cultural patrimony, and provides for the protection and ownership of Native American remains and cultural items unearthed on federal and tribal lands.<sup>89</sup> The Act requires museums and federal agencies to compile an item-by-item inventory<sup>90</sup> of human remains and associated funerary objects<sup>91</sup> in their possession or control.<sup>92</sup> Among other requirements, inventories are to be "completed in consultation with tribal government . . . officials and traditional religious leaders."<sup>93</sup> Significantly, a "museum" for purposes of NAGPRA includes "any institution or State or local government

agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items."<sup>94</sup>

In addition to compiling an inventory, museums and federal agencies are directed "to the extent possible based on information possessed by such museum or federal agency, [to] identify the geographical and cultural affiliation<sup>95</sup> of each item."<sup>96</sup> In cases where the cultural affiliation of any particular Native American human remains or associated funerary objects is determined, the museum or federal agency concerned must notify the affected Indian tribes within six months after completing the inventory.<sup>97</sup> The notification must include information identifying all Native American human remains or associated funerary objects and the circumstances surrounding their acquisition, listing the human remains or associated funerary objects that are clearly identifiable as to tribal origin, and listing remains or objects that are reasonably believed to be culturally affiliated with the Indian tribe.<sup>98</sup>

NAGPRA also requires that museums and federal agencies prepare written summaries of their collections of unassociated funerary objects,<sup>99</sup> sacred objects,<sup>100</sup> and items of cultural patrimony.<sup>101</sup> The summary must describe the scope of the collection, the types of objects included, reference to geographical location, means and period of acquisition, and cultural affiliation, where readily ascertainable.<sup>102</sup> The summary is intended to serve in lieu of an object-by-object inventory, and is to be followed by consultation with tribal government officials and traditional religious leaders.<sup>103</sup> Upon request, Indian tribes must be provided access to records, catalogs, relevant studies, or other pertinent data for the purpose of determining the geographical origin, cultural affiliation, and basic facts surrounding the acquisition and accession of such items.<sup>104</sup>

NAGPRA requires that, where the cultural affiliation of Native American human remains and associated funerary objects with a particular Indian tribe has been established, the concerned museum or federal agency must "expeditiously return" such remains and funerary objects upon the request of "a known lineal descendant of the Native American or of the tribe. . . ."<sup>105</sup> Likewise, unassociated funerary objects, sacred objects or items of cultural patrimony whose cultural affiliation has been established must also be expeditiously returned to the affiliated Indian tribe upon request.<sup>106</sup> In either case, the return of cultural items "shall be in consultation with the requesting lineal descendant or tribe . . . to determine the place and manner of delivery of such items."<sup>107</sup>

Enforcement of NAGPRA's provisions is governed by Section 3013 of the Act, which provides that "[t]he United States district courts shall have jurisdiction over any action brought by any person alleging a violation of this chapter and shall have the authority to issue such orders as may be necessary to enforce provisions of this chapter."

## V. The Gramly Litigation

On October 28, 1999, the Seneca Nation of Indians and the Tonawanda Seneca Nation (together, "the Seneca Nations")

(Matthew Bender & Co., Inc.)

lodged a complaint with the Attorney General's office concerning the alleged unauthorized excavation of a Native American burial site by Richard Michael Gramly, an archaeologist based in Buffalo, New York. The burial site is located on private land in the Town of Hamburg in Erie County, New York, and is known in archaeological circles as the "Kleis Site."

### A. The Kleis Site

The Kleis Site is an ancient Iroquoian village and associated burial site dating from the 17th century. The site is historically significant because it is one of a small number of Native American village occupations on the Niagara Frontier. Prior to Gramly's excavation, it was probably the least disturbed early 17th century village site in the Niagara Frontier.<sup>108</sup>

The historical significance of the Kleis Site has long been recognized by the State of New York. It was placed on the Statewide Inventory of Historic Resources in 1978. The following year, the State nominated the site for inclusion on the National Register of Historic Places ("National Register"), and it was officially placed on the National Register in April 1979. In June 1980, it was placed on the State Register of Historic Places.<sup>109</sup>

The Kleis Site is believed to have been occupied by Erie Indians, who were defeated in the 17th century by the Haudenosaunee. Following their defeat, the Erie Indians were assimilated by the Haudenosaunee. The Kleis Site, and the cultural items located on the site, are claimed by the Seneca Nations as part of their cultural heritage.

### B. Excavation of the Kleis Site

An investigation conducted jointly by the Attorney General's office and the Seneca Nations revealed that in 1998 the owner of the Kleis Site granted permission to Gramly to conduct archaeological investigations there, and he began excavating a portion of the site in September 1998. Gramly made no attempt to consult either the Seneca Nations or the State prior to excavating the site. The investigation confirmed that Gramly had removed approximately 16 human remains of adults and children from the site, as well as various funerary objects and other cultural items.

In the course of the investigation, an antiques dealer from the Buffalo area, who had in the past paid Gramly to appraise various items, came forward with vital information. He told investigators that in October 1998 he was invited into Gramly's business premises in Buffalo, where Gramly operated an Indian artifacts business under the name Great Lakes Artifacts Repository ("Great Lakes"). While there, the antiques dealer observed seven open cardboard boxes filled with human bones lining a corridor, and was informed by Gramly that the boxes contained Native American remains that had been removed from the Kleis Site. During that visit, Gramly also exhibited a piece of pottery that he stated had been removed from the Kleis Site, and which was being kept in the Great Lakes office as a decoration.

A turning point in the investigation occurred when it was

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discovered that Gramly had conducted his excavations of the Kleis Site as part of a field archaeology course he taught as an Adjunct Professor at Canisius College, and had used students from the college to assist in the excavations. The fact that he conducted the excavation under the college's auspices provided the legal basis to bring suit under NAGPRA to enjoin excavation of the Kleis Site, and to prevent the desecration of the human remains and artifacts removed from the Site.

### C. The NAGPRA Suit

On December 28, 1999, the Attorney General and the Seneca Nations filed suit against Gramly, Great Lakes, and Canisius College in federal district court in Buffalo pursuant to Section 3013 of NAGPRA.<sup>110</sup> The complaint alleged that the college was a "museum" as defined by NAGPRA because it received federal funds and had "control over" cultural items from the Kleis Site,<sup>111</sup> and that the defendants had failed to comply with NAGPRA's inventory and repatriation requirements.<sup>112</sup> Plaintiffs also alleged that Gramly's improper storage of human remains and other items from the Site without appropriate climate controls placed them in peril of damage or destruction, and that Gramly's participation in the artifacts trade posed a risk that the Kleis Site items would be sold or concealed.

Simultaneous with the filing of the complaint, the Attorney General and the Seneca Nations moved for a preliminary injunction (i) enjoining further excavations at the Kleis Site, (ii) requiring defendants to produce an inventory of all human remains and cultural items removed from the site, and to identify all persons who had participated in excavations at the site, and (iii) compelling defendants to relinquish possession of all remains and cultural items removed from the site to a court-appointed receiver. Plaintiffs also moved for a temporary restraining order (TRO) enjoining defendants from concealing, moving, selling, impairing or destroying items removed from the site, and compelling Gramly to provide access to his business premises for the purpose of allowing plaintiffs to conduct an interim inventory of Kleis Site items.

Shortly after service of the complaint on defendants, the parties entered into negotiations that resulted in an interim Stipulation and Order, entered on January 4, 2000, granting plaintiffs essentially the relief sought in the motion for the TRO and preliminary injunction. Pursuant to the Stipulation, excavations at the Kleis Site were halted, all items removed from the Site were placed in a climate-controlled vault at Gramly's business premises, Gramly agreed to retrieve all excavated items that had been transferred to other persons, Seneca representatives were granted access to the premises to conduct an interim inventory, and a deadline for defendants to provide a complete inventory of human remains and cultural items removed from the Site was established. Gramly also repatriated the human remains in his possession to the Seneca Nations.<sup>113</sup>

### D. The Settlement

Following entry of the interim Stipulation and Order, the

parties continued negotiations in an effort to resolve the litigation. These efforts proved successful, culminating in the filing of a Stipulation of Settlement and Dismissal on July 5, 2000.

Under the terms of the settlement, Gramly and Great Lakes agreed to permanently refrain from excavating the Kleis Site, and to repatriate to the Seneca Nations all cultural items removed from the site. With respect to any future excavation of Native American archaeological sites on any land, public or private, in New York State, Gramly agreed to comply with NAGPRA and the NYAC Burial Resolution.<sup>114</sup> Gramly also agreed to refrain from any future excavation of Native American archaeological sites on any land in New York State without first consulting with and obtaining the written permission of the closest culturally affiliated Indian tribe or nation, and agreed to stipulated penalties in the event he violates any term or condition of the settlement agreement.

The settlement also required Canisius College to permanently refrain from excavating the Kleis Site, and to comply with NAGPRA and the NYAC Burial Resolution with respect to any future excavation of Native American archaeological sites on any land, public or private, in New York State. The college also agreed to provide at least 30-days' advance notice to the closest culturally affiliated Indian tribe before commencing any future excavation of Native American archaeological sites on any land in New York State, and to provide written notice of the settlement terms to all faculty and adjunct faculty in its Anthropology Department.

## VI. Opportunities for Continuing State/Tribal Cooperation

The *Gramly* case is a milestone in terms of cooperation between the State and Native American communities to protect burial sites. For the first time, the State and Indian nations pooled resources to conduct a joint investigation of a burial site disturbance. This cooperative effort resulted in the first joint prosecution by a state and Indian nations under NAGPRA, and achieved an outcome that was mutually beneficial to the State and the Seneca Nations. Although the success of the *Gramly* litigation is likely to provide some deterrent against burial site disturbance in New York, other factors such as the thriving black market in Native American artifacts,<sup>115</sup> overzealous amateur collectors, and cultural insensitivity<sup>116</sup> make it likely that such disturbances will occur again. In the event that historically significant burial sites are subject to future incursions, the experience in the *Gramly* case provides a blueprint for continuing collaboration between the State and Native American communities to protect those sites.

The cornerstone of successful cooperation in the *Gramly* case was the willingness of both the State and the Seneca Nations to bridge cultural differences. For the State, this involved recognizing the Haudenosaunee perspective of the relation between the State and the Haudenosaunee people as symbolized by the Two-Row Wampum. In practical terms, this meant that information was freely shared, there was meaningful consultation with the Seneca Nations at every stage of the matter, and

decisions on litigation strategy, settlement positions, and other significant issues were arrived at by consensus.<sup>117</sup>

The State's recognition of the cultural and religious implications to the Haudenosaunee of the Kleis Site disturbance was also important. The circumstances of the *Gramly* case plainly struck a deep chord with the Seneca Nations. Not only were human remains and funerary objects removed from their resting place at the Kleis Site, but they were also treated with profound disrespect after being removed. An understanding of the extent to which this behavior was repugnant to Haudenosaunee beliefs facilitated the State's collaborative efforts.

For the Seneca Nations, the bridging of cultural differences involved departing from their oral tradition<sup>118</sup> to the extent of making written submissions to the court describing their customs and beliefs regarding burial sites. In addition, once the litigation was commenced, they were faced with the unusual prospect of having lawyers speak for them on matters of cultural significance, and were obliged to adjust their governmental decision-making to meet the demands of a fast-developing litigation.<sup>119</sup> The State and the Haudenosaunee share an interest in protecting historically significant burial sites from desecration and looting.

By following the precedent established in *Gramly* of bridging cultural differences to work cooperatively, that shared interest can continue to be protected.

## VII. Conclusion

The protection afforded Native American burial sites under New York State law is meager. This, in conjunction with differing historical and cultural perspectives, has in the past hindered collaborative efforts between the State and Native American communities to protect historically significant burial sites. The *Gramly* case demonstrates that State/tribal cooperation on burial site issues is possible, and can lead to beneficial results. Cooperation in the *Gramly* case was facilitated by establishment of a government-to-government relation between the Attorney General's office and the affected Indian nations, and through understanding Haudenosaunee cultural and religious beliefs. The success of similar collaborative efforts in the future depends upon continuing a relationship of mutual respect between the State and Native American communities, and upon the willingness of State authorities and tribal leaders to bridge cultural differences.

*Christopher A. Amato is Deputy Chief of the Attorney General's Environmental Protection Bureau in Albany. He wishes to thank Kim Farrow, Legal Assistant in the Environmental Protection Bureau; Peter Jemison, former Chairman of the Haudenosaunee Standing Committee on Burial Rules and Regulations; Dr. Robert Kuhn, Assistant Director, OPRHP Field Services Unit; Joseph Heath, General Counsel to the Onondaga*

*Nation; Rick Hill, current Chairman of the Haudenosaunee Standing Committee on Burial Rules and Regulations; Christine Abrams, Tonawanda Seneca Nation; Charles Vandrei, Historic Preservation Officer, New York State Department of Environmental Conservation; and Kathy Mitchell, Tribal Historic Preservation Officer for the Seneca Nation of Indians, for their assistance in the preparation of this article.*

<sup>1</sup> Two state laws require assessment of impacts on cultural and historic resources in certain circumstances: the State Environmental Quality Review Act (SEQRA), codified as New York State Environmental Conservation Law (ECL) art. 8; and the State Historic Preservation Act (SHPA), codified as New York State Parks Recreation and Historic Preservation Law ("PRHPL"), art. 14. The specific requirements of these laws are discussed *infra*, at Section III.

<sup>2</sup> The sale of artifacts plundered from Native American burial sites throughout the United States has been estimated as a billion dollar per year business. See generally, Derek V. Goodwin, *Raiders of the Sacred Sites*, N.Y. Times Mag., Dec. 7, 1986 at 64; Harvey Arden, *Who Owns Our Past?*, 175 National Geographic 376 (1989). With the advent of the Internet, the trade in Native American artifacts has increased, leading to fears that the ease and anonymity of Internet transactions could inspire a rise in illegal excavations. See Susan Snyder, *Internet Auctions Get Into Sticky Business of Ancient Artifacts*, Las Vegas Sun (Oct. 10, 1999).

<sup>3</sup> See, e.g., the facts in *State of New York et al. v. Richard Michael Gramly et al.*, discussed *infra*, at Section V.

<sup>4</sup> Interview with Robert Kuhn, Ph.D., Assistant Director, Field Services Unit, New York State Office of Parks, Recreation and Historic Preservation.

<sup>5</sup> Many Native American burial sites in New York contain funerary objects

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that were buried with the deceased. For example, Seneca women were often interred with bowls of food, tools, ornamental items and personal possessions, while the men were buried with tools, weapons, pipes, beads, effigies, and other spiritually significant items. Children were often buried with lavish presents, including large quantities of glass and shell belts and necklaces. See Daniel K. Richter, *The Ordeal of the Longhouse: The Peoples of the Iroquois League in the Era of European Colonization*, at 81-82 (1992).

<sup>6</sup> According to Peter Jemison, former Chairman of the Haudenosaunee Standing Committee on Burial Rules and Regulations, incidents of disturbance of Native American burial sites in New York have doubled within the last 15 years. The Haudenosaunee Standing Committee on Burial Rules and Regulations includes representatives from the St. Regis Mohawk Tribe, Onondaga Nation, Cayuga Nation, Seneca Nation of Indians, Tonawanda Seneca Nation, and Tuscarora Nation. In addition to representing the interests of these nations on burial site issues, the Standing Committee speaks for its members on issues involving repatriation of human remains and cultural artifacts.

<sup>7</sup> The Haudenosaunee Standing Committee on Burial Rules and Regulations, *supra* note 6.

<sup>8</sup> See, e.g., *Shinnecock Indian Nation, et al. v. Planning Bd. of Town of Southampton, et al.*, Index No. 2000-04870 (N.Y. Sup. Ct. Suffolk Co., filed Feb. 25, 2000) (challenge by Shinnecock Nation to proposed development of

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lands alleged to include historic burials and sites of religious significance on the ground, *inter alia*, of insufficient review under SEQRA); Regional Action Group for the Env't, Inc. v. Zagata, Index No. 1822-96, (Sup. Ct. Albany Co. filed Apr. 1, 1996) (challenge by not-for-profit corporation with Native American members to adequacy of archaeological review under SEQRA for project involving potential disturbance of burial grounds).

Another indication of the more active role Indian nations are beginning to take in protection of cultural resources was the designation in October 2000 of a member of the Seneca Nation of Indians as the Tribal Historic Preservation Officer pursuant to the National Historic Preservation Act, 16 U.S.C. § 740a(d)(2). The designation authorizes the Tribal Historic Preservation Officer to discharge the responsibilities of a State Historic Preservation Officer within the bounds of the Seneca reservation. These responsibilities include identification of historic properties, evaluation of their significance, formulation of measures to protect those properties deemed worthy of protection, and consultation with federal agencies concerning actions that may affect historic properties. See 16 U.S.C. § 470a(b)(3); 36 C.F.R. § 61.4(b).

<sup>9</sup> Forty-three sites currently listed on the State Register of Historic Places either contain known Native American burial sites or have a substantial likelihood of containing such burials. In addition, nearly 1,000 sites that contain or are likely to contain Native American burials are eligible for listing on the State Register. Interview with Robert Kuhn, *supra* note 4.

<sup>10</sup> 25 U.S.C. §§ 3001 to 3013.

<sup>11</sup> Federal recognition confers certain immunities and privileges, and establishes a government-to-government relationship between the recognized Indian nation and the federal government. Recognition also establishes the eligibility of the Indian nation for various social, education and health services provided through the Bureau of Indian Affairs. See 25 C.F.R. pt. 83.

<sup>12</sup> 65 Fed. Reg. 13298-13303 (Mar. 13, 2000). The issue of federal recognition is complex because of the existence, in some instances, of more than one tribal government. For example, several Indian nations in New York have both a traditional government and an elected government established under New York's Indian Law. Four of the traditional governments (Onondaga, Cayuga, Tonawanda Seneca Nation and Tuscarora) are recognized by the federal and New York State governments. Only the elected governments of the St. Regis Mohawk Tribe and the Seneca Nation are recognized by the federal and State governments. See Joseph J. Heath, *Review of the History of the April 1997 Trade and Commerce Agreement Among the Traditional Haudenosaunee Councils of Chiefs and New York State and the Impact Thereof on Haudenosaunee Sovereignty*, 46 Buff. L. Rev. 1011, 1022-26 (1998).

<sup>13</sup> Most scholars believe that the Iroquois Confederacy was established by 1600 and may have been formed as early as 1400. The Confederacy originally included the Mohawks, Oneida, Onondaga, Cayuga and Seneca. The Tuscarora became the sixth nation by 1722, after fleeing colonial slave hunters in their North Carolina homelands and taking refuge under the protection of the Confederacy. See Robert W. Venables, *Introduction to The Six Nations of New York: The 1892 United States Extra Census Bulletin, vii-viii* (reprint 1995) (1892). The Confederacy was a political and cultural alliance that provided a vehicle for joint action by its members on matters of diplomatic importance, but which preserved the autonomy and diversity of its members. See *Structure, Continuity and Change in the Process of Iroquois Treaty Making in The History and Culture of Iroquois Diplomacy* 9, 14-18 (Francis Jennings, et al. eds., 1985).

<sup>14</sup> Although there were formerly six member nations of the Iroquois Confederacy, the descendants of the Confederacy Senecas are now part of two New York Seneca nations that are separately recognized by the federal and state governments.

<sup>15</sup> The longhouse was the traditional dwelling place of the Haudenosaunee people. The longhouse was a multifamily dwelling constructed with a wood frame, rafters and an arched roof, and weatherproofed with large sheets of bark. See Venables, *supra* note 13, at viii. The name not only evokes the communal spirit of the longhouse, but also serves as a metaphor for the Confederacy which extended across much of what is now northern and western New York State. According to the traditional Haudenosaunee view, the Mohawks are the Keeper of the Eastern Door of this longhouse; the Seneca are the Keepers of the Western Door; and the Onondaga Nation is the keeper of the central hearth and fire, where the Grand Council of the Confederacy meets. *Id.*

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<sup>16</sup> The Cayuga currently have no reservation lands. Many Cayuga currently reside on the Seneca reservations.

<sup>17</sup> N.Y.S. Dept. of Transportation Geographic Information System, *Minor Civil Divisions Coverage*.

<sup>18</sup> *Id.*

<sup>19</sup> See Venables, *supra* note 13, at vii.

<sup>20</sup> In fact, burial sites may also be located in areas other than historic village sites. Research indicates that Haudenosaunee burial grounds are not always associated with villages, leading one researcher to hypothesize that the Haudenosaunee may have maintained large cemeteries in areas isolated from village sites. See, e.g., Daniel H. Weiskotten, "Patterns of Iroquois Burial," Masters' Thesis, State University of New York at Albany, Department of Anthropology (1996).

<sup>21</sup> See N.Y. Indian Law arts. 9 and 10.

<sup>22</sup> For the Iroquois, wampum was the "word" or the "voice" containing messages to be delivered, and played a major role in conveying, accepting or rejecting messages and proposals at treaties. Wampum belts symbolized the words spoken and exchanged during political transactions. See *Iroquois Treaties: Common Forms, Varying Interpretations* in Jennings et al., *supra* note 13, at 88. Physically, wampum belts were cylindrical beads, made principally of whelk or quahog shells, drilled through from opposite ends, and strung in rows with sinew, vegetable fiber or thread, forming a rectangular belt that was usually longer than wide. The beads were deep purple or white in color, and wampum belts were made of beads of one color or of a combination of purple and white beads often strung to form graphic patterns. *Id.*

<sup>23</sup> Robert B. Porter, *A Proposal to the Haudenosaunee to Decolonize Federal Indian Control Law*, 31 U. Mich. J. L. Ref. 899, 987-88 (1999). For a further description of the symbolic value of the Two-Row Wampum see G. Peter Jemison, *Sovereignty and Treaty Rights—We Remember*, in *Treaty of Canandaigua 1794: 200 Years of Treaty Relations Between the Iroquois Confederacy and the United States* at 149 (G. Peter Jemison, et al. eds. 2000).

<sup>24</sup> Porter, *supra* note 23, at 988.

<sup>25</sup> Haudenosaunee Standing Committee on Burial Rules and Regulations, *Haudenosaunee Statement on Human Remains* (undated).

<sup>26</sup> The majority of other states have laws specifically addressing either protection of unmarked graves, reburial of human skeletal remains, repatriation of human skeletal remains and grave goods, or a combination of these elements. These statutes afford more protection to Native American burial sites than New York law, insofar as they prohibit or strictly regulate disturbance of unmarked graves, and in most instances require notification to appropriate Indian tribes if the grave site is determined to contain Native American remains. See U.S. Department of Agriculture, *Natural Resource Conservation Service, Update of Compilation of State Repatriation, Reburial and Grave Protection Laws* (1997).

<sup>27</sup> N.Y. Canal Law § 41 (providing for exhumation and reinterment of remains when lands containing graves acquired for canal purposes).

<sup>28</sup> N.Y. High. Law § 181 (authorizing transfer of remains for purposes of building private road or public highway). However, there is a statutory prohibition against pipelines being constructed through cemeteries or burial grounds. See N.Y. Transp. Corp. Law § 83.

<sup>29</sup> ECL § 23-1303 (providing for relocation of remains when cemeteries or burial grounds are condemned by public utility to obtain access to natural gas reservoirs).

<sup>30</sup> See N.Y. County Law § 222 (authorizing relocation of veterans' remains to county cemeteries); N.Y. Town Law §§ 295, 296 (authorizing relocation of remains from abandoned cemeteries to incorporated cemeteries).

<sup>31</sup> N.Y. Membership Corp. Law § 81.

<sup>32</sup> Only the Highway Law contains anything approaching a standard, requiring that remains be "carefully removed and properly reinterred in another burying ground . . ." N.Y. High. Law § 181.

<sup>33</sup> N.Y. Not-For-Profit Corp. Law § 1510(e).

<sup>34</sup> *Id.*

<sup>35</sup> *Briggs v. Hemstreet-Briggs*, 256 A.D.2d 894 (3d Dept. 1998). Although

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case law interpreting NPCL § 1510(e) has imposed fairly stringent legal standards for disinterment of remains pursuant to that statute, the courts have stopped short of enunciating standards for how remains are to be treated once they are disinterred.

<sup>36</sup> The term "objects of archaeological or paleontological interest" is undefined.

<sup>37</sup> N.Y. Educ. Law § 233.

<sup>38</sup> *Id.*

<sup>39</sup> N.Y. Pub. Health Law (PHL) § 4216.

<sup>40</sup> N.Y. Pub. Health Law § 4218.

<sup>41</sup> These provisions have been held not to preclude the condemnation of a private cemetery (and the removal of remains) for park purposes. *Matter of Bd. of Street Opening*, 133 N.Y. 329 (1892); exhumation for the purpose of determining whether a crime has been committed, *People v. Fitzgerald*, 105 N.Y. 146 (1887); or disinterment to obtain evidence in a malpractice action, *Rhodes v. Brandt*, 21 Han. 1 (1880). In a prosecution under PHL § 4216, evidence that the defendant removed a skull from an exposed grave and brought it to a Halloween party was found sufficient for a grand jury to find that defendant had acted from malice or wantonness within the meaning of the statute. *People v. Curtis*, 87 A.D.2d 954 (3d Dept. 1982).

<sup>42</sup> Interview with Peter Jemison, *supra* note 6.

<sup>43</sup> The problem with the PHL provisions is that they were enacted to address the theft and sale of cadavers from marked cemeteries, not to protect historic grave sites. Actions brought in other states have highlighted the obstacles encountered in attempting to use these types of statutes to protect historic burial sites. *See, e.g., Wynn the Bear v. Community Constr., Inc.*, 128 Cal. App. 3d 536 (1982) (holding that Native American burial site was not a "cemetery" within the meaning of state cemetery protection laws); *State v. Glass*, 273 N.E.2d 893 (Ohio Ct. App. 1971) (historic skeletal remains held not to be "corpses" for purpose of Ohio grave-robbing statute).

<sup>44</sup> ECL § 8-0101 *et seq.*

<sup>45</sup> ECL § 8-0109(2).

<sup>46</sup> SEQRA defines "environment" to include "the physical conditions which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character." ECL § 8-0105(7).

<sup>47</sup> 6 N.Y.C.R.R. § 617.7(c)(1)(v).

<sup>48</sup> ECL §§ 8-0109(2)(b), (c) and (f).

<sup>49</sup> ECL § 8-0109(1).

<sup>50</sup> For a detailed discussion of SEQRA's requirements concerning impacts on historic properties, *see* Michael B. Gerrard, Daniel A. Ruzow, Philip Weinberg, *Environmental Impact Review in New York* §§ 4.20, 5.12[14] (Matthew Bender).

<sup>51</sup> *See Town of Bedford v. White*, 204 A.D.2d 557 (2d Dept. 1994) (annulling as arbitrary and capricious agency determination that installation of traffic light in registered historic district was "Type II" action not requiring preparation of EIS); *Lorberbaum v. Pearl*, 182 A.D.2d 897 (3d Dept. 1992) (project located "substantially contiguous" to registered historic sites qualifies it as "Type I" action likely to require preparation of an EIS); *Houser v. Finneran*, 99 A.D.2d 926 (3d Dept. 1984) (annulling agency determination that confirmation of cable television franchise, involving installation of new cable lines near historic site, constituted Type II action).

<sup>52</sup> *Acton v. Wallace*, 112 A.D.2d 581 (3d Dept. 1985), *appeal granted*, 66 N.Y.2d 605, *aff'd*, 67 N.Y.2d 953 (1986).

<sup>53</sup> *Anderberg v. N.Y.S. Dept. of Envtl. Conservation*, 141 Misc. 2d 594 (Sup. Ct. Albany Co. 1988).

<sup>54</sup> *See, e.g., WEOK Broadcasting Corp. v. Planning Bd. of Town of Lloyd*, 79 N.Y.2d 373 (1992) (town planning board's denial of site plan approval for construction of radio transmission towers, where there had been conflicting

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testimony concerning the towers' visual impacts on a nearby historic site, overturned as being unsupported by substantial evidence).

<sup>55</sup> *Southampton Ass'n, Inc. v. Planning Bd. of Village of Southampton*, 109 A.D.2d 204 (2d Dept. 1985) (effects of road and subdivision on historic property held adequately mitigated by revised plan, thereby eliminating need for EIS); *Soule v. Town of Colonie*, 95 A.D.2d 979 (3d Dept. 1983) (mitigation of potential impacts to historic district held to obviate need for EIS).

<sup>56</sup> N.Y. Parks, Rec. and Hist. Preserv. Law (PRHPL) art. 14.

<sup>57</sup> The criteria applied in determining whether to place a site on the State Register include:

(a) The quality or significance in American history, architecture and culture is present in districts, sites, buildings, structures and objects that possess integrity of location, design, setting, materials, workmanship, feeling and association, and:

(1) that are associated with events that have made a significant contribution to the broad patterns of our history; or

(2) that are associated with the lives of persons significant in our past; or

(3) that embody the distinctive characteristics of type, period or method of construction, or that represent the work of a master, or that possess high artistic value, or that represent a significant and distinguishable entity whose components may lack individual distinction; or

(4) that have yielded, or may be likely to yield, information important in prehistory or history.

9 N.Y.C.R.R. § 427.3(a).

<sup>58</sup> N.Y. Parks, Rec. and Hist. Preserv. Law § 14.09(1). In making this assessment, consideration must be given to whether the proposed undertaking is likely to cause destruction or alteration of all or part of the property, isolation or alteration of the property's environment, introduction of visual, audible or atmospheric elements which are out of character with the property or alter its setting, or neglect of the property resulting in its deterioration or destruction. 9 N.Y.C.R.R. § 428.7(a).

<sup>59</sup> 9 N.Y.C.R.R. § 428.7(a).

<sup>60</sup> 9 N.Y.C.R.R. § 428.8(a).

<sup>61</sup> 9 N.Y.C.R.R. § 428.8(b).

<sup>62</sup> 9 N.Y.C.R.R. § 428.8(c).

<sup>63</sup> *See* 9 N.Y.C.R.R. § 428.9, which makes the agency proposing the undertaking responsible "for obtaining the views of the public concerning the undertaking," but does not establish a specific procedure for doing so.

<sup>64</sup> In fact, lack of notice concerning proposed agency actions affecting historically significant Native American sites is one of the prime sources of dissatisfaction among New York's Native American communities with current New York law. Interview with Rick Hill, Chairman, Haudenosaunee Standing Committee on Burial Rules and Regulations; interview with Peter Jemison, *supra* note 6.

<sup>65</sup> N.Y. Indian Law § 12-a (emphasis added).

<sup>66</sup> *Id.*

<sup>67</sup> S.3284-A, A. 3842-A, Leg. Mem. (1971).

<sup>68</sup> *Id.*

<sup>69</sup> 1971 N.Y. Laws ch. 1195, § 2.

<sup>70</sup> The only site to be formally designated under Section 12-a is a publicly owned property containing a known burial site located in the Village of Owego in Tioga County. The site was designated by OPRHP in response to a request for designation from the Village. Interview with Robert Kuhn, *supra* note 4.

<sup>71</sup> NYAC is a professional organization of New York State archaeologists. The purposes of NYAC are "[t]o stimulate, guide, direct and conduct research in the field of archaeology in the State of New York; to publish the results of such archaeological research; . . . to promote the exchange of information among

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the various individuals and organizations engaged in the study of archaeology in New York State and elsewhere; (and) to foster and promote knowledge of and interest in public archaeology and archaeological preservation." NYAC Certificate of Incorporation.

<sup>72</sup> NYAC Standards § 5.0.

<sup>73</sup> NYAC Burial Resolution, NYAC Standards app. B.

<sup>74</sup> The full text of the resolution is as follows:

Whereas, the Native Americans of New York State regard the disturbance of their burials in the ground as disrespectful to their dead; and

Whereas, the [NYAC], the representatives of the majority of the professional archaeologists working in New York State, recognizes that the same legal and ethical treatment should be accorded all human burials irrespective of racial or ethnic origins; and

Whereas, NYAC recognizes that despite our position the disturbance of burials by others is and will be a reality; therefore,

Resolved,

1) That the [NYAC] urges a moratorium on planned burial excavation of Indian skeletons in New York State until such time as public opinion regards the recovery of skeletal data as a scientific endeavor irrespective of racial or ethnic identity.

2) That we oppose the excavation of burials for teaching purposes as pedagogically unnecessary and scientifically destructive.

3) That we agree in the future to reburial of Indian skeletons in a manner and at a time prescribed by the Native Americans whenever burials are chance encounters during archaeological excavations or other earth-moving activities.

4) That we request the opportunity to study these skeletons for their scientific and historic significance before reburial, and

5) That when a burial ground is being disturbed by untrained individuals, a committee of local Native Americans and archaeologists should jointly plan the salvage of information and the preservation of remains. Although the NYAC Standards and the Burial Resolution (which remains in effect) represent a reasonable effort to address Native American concerns about disturbance of burial sites, neither is binding on New York archaeologists (or on archaeologists from other states working in New York) and they do not have the effect of law.

<sup>75</sup> Two other federal statutes include provisions affecting Native American burial sites and cultural resources: the National Historic Preservation Act, 16 U.S.C. §§ 470 to 470w-6 (NHPA), and the Archaeological Resource Protection Act, 16 U.S.C. §§ 470aa to 470ll (ARPA). NHPA establishes a National Register of Historic Places and sets forth procedures for placing sites on the National Register. 16 U.S.C. § 470a. The Act requires that prior to undertaking, funding or approving an action, federal agencies consult with an affected Indian tribe when an activity will affect a property of "traditional religious and cultural importance" to that tribe. 16 U.S.C. § 470a(d)(6). In addition, Indian tribes may assume the responsibilities of a State Historic Preservation Officer, which include identification of historic properties, evaluation of their significance, and formulation of measures to protect such properties, for tribal lands. 16 U.S.C. § 470a(d)(2).

ARPA requires a permit for the excavation of human remains and cultural artifacts located on federal or tribal lands. 16 U.S.C. § 470cc(a). The Act requires that if a permit may result in "harm to, or destruction of, any religious or cultural site," the federal land manager must provide notice to "any Indian tribe which may consider the site as having religious or cultural importance." 16 U.S.C. § 470cc(c).

<sup>76</sup> 136 Cong. Rec. H10985, 10988 (daily ed. Oct. 22, 1990) (statement of Rep. Campbell).

<sup>77</sup> Jack F. Trope and Walter R. Echohawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 *Ariz. St. L.J.* 35, 59 (1992).

<sup>78</sup> 136 Cong. Rec. S17174 (daily ed. Oct. 26, 1990) (statement of Sen. Matthew Bender & Co., Inc.)

Inouye). See also *id.* at S17175 (statement of Sen. McCain) (NAGPRA's purpose is to "rightfully move to restore tens of thousands of remains to the families and tribes to whom these remains ought most appropriately be entrusted"); *id.* at S17176 (statement of Sen. Domenici) ("In simple terms [NAGPRA provides] for the return of Indian burial mounds and other religious items that properly belong with Indian tribes rather than storage rooms in museum collections"); 136 Cong. Rec. H10985, 10989 (daily ed. Oct. 22, 1990) (statement of Rep. Rhodes) (NAGPRA "represents a major policy statement by the Congress with regard to the treatment of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony"); *id.* at H0989-90 (statement of Rep. Collins) (NAGPRA "is a crucial first step in returning Native American remains and artifacts to their descendants" and "is necessary to reverse hundreds of years of abuses of a people, their lands and their very roots").

<sup>79</sup> 136 Cong. Rec. S17173 (daily ed. Oct. 26, 1990) (statement of Sen. McCain).

<sup>80</sup> *Pueblo of San Ildefonso v. Ridlon*, 103 F.3d 936, 938 (10th Cir. 1996).

<sup>81</sup> In contrast to other federal statutes, federal recognition is not a prerequisite under NAGPRA to requesting repatriation. Such requests may be made by "any tribe, band, nation, or other organized group or community of Indians . . ." 25 U.S.C. §§ 3001(7), 3005.

<sup>82</sup> 25 U.S.C. § 3002(c)(1).

<sup>83</sup> 25 U.S.C. § 3002(c)(2). *But see* Kickapoo Traditional Tribe of Texas v. Chacon, 46 F. Supp. 2d 644 (W.D. Tex. 1999) (NAGPRA's requirement of tribal consent for excavation of human remains on tribal lands held not to apply to recently buried corpse which was sought by state authorities for purpose of conducting inquest into cause of death).

<sup>84</sup> 25 U.S.C. § 3002(d).

<sup>85</sup> 25 U.S.C. § 3002(a)(1).

<sup>86</sup> 136 Cong. Rec. S17474-75 (daily ed. Oct. 26, 1990) (statement of Sen. Inouye).

<sup>87</sup> See 136 Cong. Rec. S17173 (daily ed. Oct. 26, 1990) (statement of Sen. McCain); 136 Cong. Rec. H10989 (daily ed. Oct. 22, 1990) (statement of Rep. Rhodes) (Panel's report "helped immensely to shape the policies contained in this bill"); 136 Cong. Rec. S17474 (daily ed. Oct. 26, 1990) (statement of Sen. Inouye); S. Rep. No. 473, 101st Cong., 2d Sess. 1, at 6 (1990) (hereafter, "Sen. Rep. 473") ("The Committee agrees with the findings and recommendations of the Panel for a National Dialogue on Museum/Native American Relations").

<sup>88</sup> The major conclusions of the Panel, as summarized by the Senate Select Committee on Indian Affairs, were as follows:

The Panel found that the process for determining the appropriate disposition and treatment of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony should be governed by respect for Native American rights. The Panel report states that human remains must at all times be accorded dignity and respect. The Panel report indicated the need for Federal legislation to implement the recommendations of the Panel.

The Panel also recommended the development of judicially enforceable standards for repatriation of Native American human remains and objects. The report recommended that museums consult with Indian tribes to the fullest extent possible regarding the right of possession and treatment of remains and objects prior to acquiring sensitive materials. Additional recommendations of the Panel included requiring regular consultation and dialogue between Indian tribes and museums; providing Indian tribes with access to information regarding remains and objects in museum collections; providing that Indian tribes should have the right to determine the appropriate disposition of remains and funerary objects and that reasonable accommodations should be made to allow valid and respectful scientific use of materials when it is compatible with tribal religious and cultural practices.

Sen. Rep. 473 at 2-3.

<sup>89</sup> 25 U.S.C. § 3002(c).

<sup>90</sup> The inventory called for by this section is "a simple itemized list that summarizes the information called for by this section." 25 U.S.C. § 3003(c).

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<sup>91</sup> NAGPRA defines "associated funerary objects" as "objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with the individual human remains either at the time of death or later, and both the human remains and associated funerary objects are presently in the possession or control of a Federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects." 25 U.S.C. § 3001(3)(A).

<sup>92</sup> 25 U.S.C. § 3003(a).

<sup>93</sup> 25 U.S.C. § 3003(b)(1)(A).

<sup>94</sup> 25 U.S.C. § 3001(8). "Cultural items," include human remains and associated funerary objects, unassociated funerary objects, sacred objects, and items of cultural patrimony. 25 U.S.C. § 3001(3).

<sup>95</sup> "Cultural affiliation" is defined as "a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group." 25 U.S.C. § 3001(2).

<sup>96</sup> 25 U.S.C. § 3003(a).

<sup>97</sup> 25 U.S.C. § 3003(d)(1).

<sup>98</sup> 25 U.S.C. § 3003(d)(2). The Act further provides that any Indian tribe that receives "or should have received notice" pursuant to § 3003(d) may request that a museum or federal agency supply additional available documentation to supplement the inventory and cultural affiliation information required by § 3003(a). Such additional documentation may include a summary of existing museum or agency records, including inventories and catalogs, relevant studies, or other pertinent data "for the limited purpose of determining the geographical origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American human remains and associated funerary objects . . ." 25 U.S.C. § 3003(b)(2).

<sup>99</sup> "Unassociated funerary objects" means "objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, where the remains are not in the possession or control of the Federal agency or museum and the objects can be identified by a preponderance of the evidence as related to specific individuals or families or to known human remains or, by a preponderance of the evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe." 25 U.S.C. § 3001(3)(B).

<sup>100</sup> "Sacred objects" means "specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents." 25 U.S.C. § 3001(3)(C).

<sup>101</sup> "Cultural patrimony" means "an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from the group." 25 U.S.C. § 3001(3)(D).

<sup>102</sup> 25 U.S.C. § 3004(a).

<sup>103</sup> 25 U.S.C. § 3004(b)(1).

<sup>104</sup> 25 U.S.C. § 3004(b)(2).

<sup>105</sup> 25 U.S.C. § 3005(a)(1). The requirement of an "expeditious return" is waived only in cases where the cultural items requested "are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States." 25 U.S.C. § 3005(b). In these limited circumstances, the items must be returned within ninety days after completion of the scientific study. 25 U.S.C. § 3005(b).

<sup>106</sup> 25 U.S.C. § 3005(a)(2).

<sup>107</sup> 25 U.S.C. § 3005(a)(3). If a museum or agency does not establish the cultural affiliation of cultural items in its possession, whether through an inventory or a summary, such items must be expeditiously returned where a requesting Indian tribe shows a cultural affiliation by a preponderance of the evidence based on "geographical, kinship, biological, archaeological, linguistic, folkloric, oral tradition, historical, or other relevant information or expert opinion."

25 U.S.C. § 3005(a)(4). Moreover, where an Indian tribe requests the return of unassociated funerary objects, sacred objects, or items of cultural patrimony and makes a *prima facie* showing that the concerned museum or agency does not have the right of possession, then the museum or agency must return the objects unless it overcomes the inference by proving it has a right of possession to the objects. 25 U.S.C. § 3005(c).

<sup>108</sup> See Declaration of Robert L. Dean, M.A., submitted in State of New York et al., v. Richard Michael Gramly, et al., *infra* note 110.

<sup>109</sup> This occurred by operation of law pursuant to PRHPL § 14.07(1)(a), which includes all National Register sites on the State Register.

<sup>110</sup> State of New York, Seneca Nation of Indians and Tonawanda Seneca Nation v. Richard Michael Gramly, Great Lakes Artifacts Repository, and Canisius College, Civ. No. 99-1045 (W.D.N.Y. filed Dec. 28, 1999).

<sup>111</sup> See 25 U.S.C. § 3001(8).

<sup>112</sup> The complaint included additional state law causes of action, asserted by the Attorney General, that the excavation of the Kleis Site was conducted in violation of PHL §§ 4216 and 4218. See *supra* notes 39-41 and accompanying text.

<sup>113</sup> Following repatriation, the remains were reburied on Seneca lands on the Tonawanda Seneca reservation.

<sup>114</sup> In addition, for those sites listed or eligible for listing on the National and/or State Register of Historic Places, Gramly agreed to comply with all other NYAC standards.

<sup>115</sup> See *supra* note 2.

<sup>116</sup> See, e.g., Edmund Carpenter, *Why Return Remains, Items, If Indians Can't Preserve Them?*, Rochester Democrat and Chronicle (Jan. 3, 2001) (claiming that repatriated Native American cultural items "go into closets, under beds [and] into casinos"); Gary L. Fogelman, *The Gramly Case*, 19 Indian Artifacts Magazine 4 (Nov. 2000) (stating, in response to Seneca complaints that Gramly had treated their ancestors' remains with disrespect by storing them in open cardboard boxes in an office hallway, "should we all have a pity party for the Seneca? . . . should he have brought a casket for each one?").

<sup>117</sup> Decision-making by consensus is fundamental tenet of the traditional Haudenosaunee political process:

Consensus is an indigenous principle. The definition of consensus decision-making is of a group process used to discern a common will from many voices. . . . [C]onsensus-based governance models common among indigenous peoples involve a patient exercise in hearing all points of view and hinges on full participation and on the persuasive ability of respected leaders.

*Words That Come Before All Else: Environmental Philosophies of the Haudenosaunee* at 11, Haudenosaunee Environmental Task Force (Undated). For a further discussion of the role of consensus decision-making in the traditional Haudenosaunee political process see Chief Irving Powless, Jr., "Treaty Making," in Jensen et al., *supra* note 23, at 24-25.

<sup>118</sup> See *Iroquois Treaties: Common Forms, Varying Interpretations* in Jennings et al., *supra* note 13, at 90-92.

<sup>119</sup> See Powless, *supra* note 117, at 18-23 for a description of the complex protocol for Haudenosaunee governmental decision-making.

Cemetery Chic

## GHOULISH THIEVES FOCUS ON CEMETERIES TO MAKE A QUICK BUCK

The theft of cemetery art, fences, and gates is clearly on the rise both here and nationwide. Small, isolated, and largely ignored cemeteries are proving to be fertile ground for a new generation of "thieves of time," who loot them for anything and everything they can sell. These felons are catering to a clientele interested in what is called "cemetery chic," a design fad for old iron work, benches, marble angels, and other "ornamentals." The art turns up at swap meets and antique stores - sometimes as far away as Los Angeles.

In New Orleans, cemetery preservationists and the local police are making a dent in the problem. In April, they arrested three New Orleans men on multiple charges of theft, desecration of graves, and possession of property stolen from local cemeteries. More amazing was that the police discovered a hoard of stolen cemetery art - valued at well over \$500,000 - before it could disappear across the country.

As the investigations continue we begin to see the dark underbelly of these crimes. Antique dealers commonly tell buyers that the fences or art work came from an "abandoned cemetery" whose contents were being auctioned off - even though historic cemeteries are rarely abandoned. The dealers also know there are laws protecting the truly abandoned cemeteries, and frequently know or suspect that the items have been stolen.

Here in South Carolina, we recently reported the theft of a very valuable - and very historic gate - from the Heyward Cemetery in Jasper County. It has still not been recovered, in spite of a \$500 reward. And even more recently, the Anderson police reported a series of thefts from at least five known cemeteries, probably all related. In fact, it's possible to trace the route of the

thieves as they traveled from one small cemetery to the next.

It isn't surprising that the crime is growing. First and fundamentally, there are buyers - individuals willing to purchase stolen artwork with no questions asked. If it weren't for those people, the theft in cemetery art would stop almost overnight. With the demand comes those willing to steal, and those willing to sell. Of course, no scrupulous antiques dealer would sell artwork without a clear provenance - those dealers should be rewarded by patronage. Those who offer gates, marble statuary, and



other artwork, should be confronted and asked where the items come from. If you are silent in the face of questionable behavior, you become part of the problem. If the dealer has evidence of clear ownership, they won't be insulted in providing that information.

Contributing further is the fact that many cemeteries are isolated and rarely patrolled. This adds the opportunity. The best protection here is to periodically visit small cemeteries. Take a slightly longer route on your errands and drive by them, looking for suspicious activities. Visit them every few weekends. Keep them maintained and looking good. Encourage

your friends in the community to do the same. Ask the county sheriff to place the cemetery on daily patrol. People frequenting the cemetery are the single best deterrent to theft. Make your visits often, but unpredictable, and thieves will have to decide if the risk is worth it. Encourage nearby residents to keep an eye on the property. It's not being a "busybody" to record license plates of cars and trucks coming and going down a dirt road to a lonely cemetery - it's being a good neighbor. One day that license number may help trace a thief.

Encourage the owners of cemeteries to make access after dark difficult.

Gate the road to the cemetery, if possible. Make thieves walk - and work - to remove heavy objects. Don't give them the chance to drive their trucks right up to the gates and statuary to load them up.

Making the recovery of even reported artwork more difficult is that very few of the fences, gates, benches, or sculptures have ever been photographed, much less marked in some way for positive identification. This weekend, take your camera to local cemeteries and photograph unique artwork and gates. Or contact your local historical society and find out if they are doing this. If they aren't already, explain the need and offer to help. But regardless, document. Videos are okay, but plain, simple black and white photographs are best. They last a long time and can be a permanent record of that particular cemetery. Be sure to label your photographs, so you know that the piece in the photograph is actually the piece stolen.

While we are concerned about defacing cemetery art by some sort of permanent marking, frankly the theft is probably far worse. Many police departments have scribes they will loan you

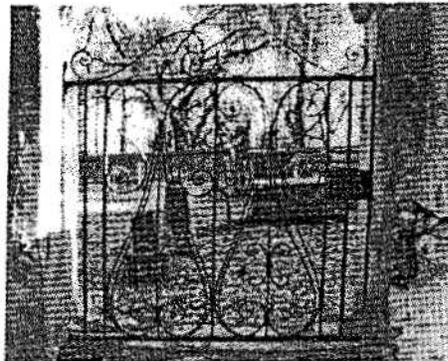
*continued on page 6*

*Cemeteries-- continued from page 4*  
to mark valuables like TV and computers. Get the permission of the cemetery and mark gates and fence sections. It takes a little work, but is a good weekend activity for a family, church, scout troop or club.

Use the side rails facing the grave, so the mark isn't obvious. Also, place the mark in the same place on each section - so even if the thieves attempt to deface it, the damage is clearly evident on each section. Brush through the rust, if there is any, using a steel bristle brush. Then scribe the name of the cemetery and city on each section. Or, if it is a church cemetery, scribe the church name. Even the family plot name may be adequate to dissuade thieves. *Make sure the scribing is deep. If the names are later taken off by thieves, you want it to be obvious - and to take some effort.* Afterwards, repaint the area you have marked, so the freshly

exposed metal doesn't encourage additional corrosion.

By caring for cemeteries - taking the responsibility to protect these historic resources - they may survive for the benefit of our children. Otherwise, there will be little left for the next generation.



*The Heyward Cemetery gate, stolen in January 1998 from Jasper County, South Carolina. Despite a \$500 reward for its recovery, the gate has not yet been located. If you have any information, please contact Detective Malphrus at 803/726-7777, or call Chicora Foundation collect at 803/787-6910.*

### What Protection Does Cemetery Art Have in SC?

South Carolina Code of Laws § 16-17-600, **Destruction or desecration of human remains or repositories thereof** deals with cemetery fences, gates, benches, and statues. It states that it is a felony for anyone to:

- deface, vandalize, injure, or remove a gravestone or other memorial monument or marker commemorating a deceased person or groups of person, whether located within or outside of a recognized cemetery, memorial park, or battlefield.

It is also a felony for anyone to: destroy, tear down, or injure only fencing, plants trees, shrubs, or flowers located upon or around a repository for human remains, or within a human graveyard or memorial park.

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# CHICORA FOUNDATION RESEARCH

YOUR GUIDE TO CURRENT RESEARCH & PUBLIC HERITAGE ISSUES

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# ARCHAEOLOGICAL INSTITUTE OF AMERICA

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## CODE OF ETHICS

The Archaeological Institute of America is dedicated to the greater understanding of archaeology, the protection and preservation of the world's archaeological resources and the information they contain, and to the encouragement and support of archaeological research and publication.

In accordance with these principles, members of the AIA should:

- Seek to ensure that the exploration of archaeological sites be conducted according to the highest standards under the direct supervision of qualified personnel, and that the results of such research be made public.
- Refuse to participate in the trade of undocumented antiquities and refrain from activities that enhance the commercial value of such objects. Undocumented antiquities are those which are not documented as belonging to a public or private collection before December 30, 1970, when the AIA Council endorsed the UNESCO Convention on Cultural Property, or which have not been excavated and exported from the country of origin in accordance with the laws of that country.
- Inform appropriate authorities of threats to, or plunder of archaeological sites, and illegal import or export of archaeological material.

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# AIA

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## ARCHAEOLOGICAL INSTITUTE OF AMERICA

### ABOUT THE AIA

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### CODE OF PROFESSIONAL STANDARDS

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##### PREAMBLE

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#### PREAMBLE

This Code applies to those members of the AIA who play an active, professional role in the recovery, care, study, or publication of archaeological material, including cultural resources located under water. Within the Institute they enjoy the privileges of organizing sessions and submitting papers for the Annual Meetings, of lecturing to local societies, participating in the AIA committees that shape and direct the discipline, participating in the placement service, and of being listed in the *Directory of Professionals in Archaeology*.

Along with those privileges come special responsibilities. Our members should inform themselves about and abide by the laws of the countries in which they live and work. They should treat others at home and in the field with respect and sensitivity. As primary stewards of the archaeological record, they should work actively to preserve that record in all its dimensions and for the long term; and they should give due consideration to the interests of others, both colleagues and the lay public, who are affected by the research.

The AIA recognizes that archaeology is a discipline dealing, in all its aspects, with the human condition, and that archaeological research must often balance competing ethical principles. This Code of Professional Standards does not seek to legislate all aspects of professional behavior and it realizes the conflicts embedded in many of the issues addressed. The Code sets forth three broad areas of responsibility and provides examples of the kinds of considerations called for by each. It aims to encourage all professional archaeologists to keep ethical considerations in mind as they plan and conduct research.

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## I. RESPONSIBILITIES TO THE ARCHAEOLOGICAL RECORD

Professional archaeologists incur responsibilities to the archaeological record – the physical remains and all the associated information about those remains, including those located under water.

1. Professional archaeologists should adhere to the Guidelines of the AIA general Code of Ethics concerning illegal antiquities in their research and publications.
2. The purposes and consequences of all archaeological research should be carefully considered before the beginning of work. Approaches and methods should be chosen that require a minimum of damage to the archaeological record. Although excavation is sometimes the appropriate means of research, archaeological survey, study of previously excavated material, and other means should be considered before resort is made to excavation.
3. The recovery and study of archaeological material from all periods should be carried out only under the supervision of qualified personnel.
4. Archaeologists should anticipate and provide for adequate and accessible long-term storage and curatorial facilities for all archaeological materials, records, and archives, including machine-readable data, which require specialized archival care and maintenance.
5. Archaeologists should make public the results of their research in a timely fashion, making evidence available to others if publication is not accomplished within a reasonable time.
6. All research projects should contain specific plans for conservation, preservation, and publication from the very outset, and funds should be secured for such purposes.

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## II. RESPONSIBILITIES TO THE PUBLIC

Because the archaeological record represents the heritage of all people, it is the responsibility of professional archaeologists to communicate with the general public about the nature of archaeological research and the importance of archaeological resources. Archaeologists also have specific responsibilities to the local communities where they carry out research and field work, as well as to their home institutions and communities.

Archaeologists should be sensitive to cultural mores and attitudes and be aware of the impact research and field work may have on a local population, both during and after the work. Such considerations should be taken into account in designing the project's strategy.

1. Professional archaeologists should be actively engaged in public outreach through lecturing, popular writing, school programs, and other educational initiatives.
2. Plans for field work should consider the ecological impact of the project and its overall impact on the local communities.

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3. Professional archaeologists should not participate in projects whose primary goal is private gain.

4. For field projects, archaeologists should consult with appropriate representatives of the local community during the planning stage, invite local participation in the project, and regularly inform the local community about the results of the research.

5. Archaeologists should respect the cultural norms and dignity of local inhabitants in areas where archaeological research is carried out.

6. The legitimate concerns of people who claim descent from, or some other connection with, cultures of the past must be balanced against the scholarly integrity of the discipline. A mutually acceptable accommodation should be sought.

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### III. RESPONSIBILITIES TO COLLEAGUES

Professional archaeologists owe consideration to colleagues, striving at all times to be fair, never plagiarize, and give credit where due.

1. Archaeologists involved in cooperative projects should strive for harmony and fairness; those in positions of authority should behave with consideration toward those under their authority, while all team members should strive to promote the success of the broader undertaking.

2. The principal investigator(s) of archaeological projects should maintain acceptable standards of safety and ascertain that staff members are adequately insured.

3. Professional archaeologists should maintain confidentiality of information gleaned in reviewing grant proposals and other such privileged sources.

4. Professional archaeologists should not practice discrimination or harassment based on sex, religion, age, race, national origin, disability, or sexual orientation; project sponsors should establish the means to eliminate and/or investigate complaints of discrimination or harassment.

5. Archaeologists should honor reasonable requests from colleagues for access to materials and records, preserving existing rights to publication, but sharing information useful for the research of others. Scholars seeking access to unpublished information should not expect to receive interpretive information if that is also unpublished and in progress.

6. Before studying and/or publishing any unpublished material archaeologists should secure proper permission, normally in writing, from the appropriate project director or the appointed representative of the sponsoring institution and/or the antiquities authorities in the country of origin.

7. Scholars studying material from a particular site should keep the project director informed of their progress and intentions; project directors should return the courtesy.

8. Members of cooperative projects should prepare and evaluate

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reports in a timely and collegial fashion.

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## ARCHAEOLOGICAL INSTITUTE OF AMERICA

### GRIEVANCE PROCEDURE

#### PREAMBLE

The AIA believes it to be in the best interest of all archaeologists to ensure that the highest standards of professional and ethical conduct are followed in all archaeological research. Therefore, it is incumbent upon the AIA as an institution to lend its weight to that effort, while recognizing that the AIA's jurisdiction is limited to its membership. In pursuing the procedures outlined in this section, the AIA will make all efforts to resolve each grievance as quickly as possible with the utmost concern for the goal of reconciliation and to respect the legitimate professional and privacy concerns of the individuals involved. We encourage complainants, in appropriate situations, to address their concerns first to the grievance office of any appropriate academic or research institution(s).

#### I. INFORMAL RESOLUTION

1.1. An Ombudsperson will be appointed by the Vice-president for Professional Responsibilities from among the members of the Professional Responsibilities Committee of the AIA in consultation with the Executive Committee of the AIA. The Ombudsperson will serve for a term of three years.

1.2. In the event of the inappropriateness of the Ombudsperson to act for any reason with respect to a specific case, the Vice-president for Professional Responsibilities will appoint another individual to serve as temporary Ombudsperson in that case.

1.3. The role of the Ombudsperson is to assist in the amicable resolution of complaints by helping AIA members find the appropriate information, person, office or committee; to mediate among disagreeing parties and to facilitate communication; to educate members of the AIA concerning the Code of Professional Standards; and to seek by every means possible a conciliatory and collegial resolution of disputes among AIA members.

1.4. The Ombudsperson will accept any allegation of violation of the Code of Professional Standards which is submitted in writing and signed. The Ombudsperson will make an initial determination as to whether the complaint is appropriate for resolution through the AIA grievance procedure and whether the complaint has any merit. If the complaint is not deemed appropriate or has no merit, the Ombudsperson will dismiss the complaint. The Ombudsperson may also refer the complaint to an academic or research institution which employs or is associated with the individual against whom the complaint was brought.

1.5. The Ombudsperson will then attempt to handle an appropriate, apparently meritorious complaint through any available means of informal resolution. The Ombudsperson will have responsibility for carrying out the policy of the AIA to resolve as many complaints as possible at this stage through such informal means as discussion,

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education, and individual meetings among the individuals involved.

1.6. If the Ombudsperson does not dismiss the complaint and if an informal resolution is not possible, then the Ombudsperson will refer the matter to the Vice-president for Professional Responsibilities who will convene a grievance panel consisting of three members to consider the complaint.

1.7. The Ombudsperson will only accept complaints made within three years of the termination of any alleged misconduct. The complaint must refer to misconduct which occurred while the individual concerned was a member of the AIA and after the effective date of the Code of Professional Standards. The Ombudsperson will not accept any complaint brought against an institution, university, college, or foreign school.

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## II. GRIEVANCE PANEL

2.1. The Vice-president for Professional Responsibilities will maintain a roster of individuals who are members in good standing of the AIA and who have indicated their willingness to serve on a grievance panel. The roster will represent a diversity of disciplines and geographic areas.

2.2. When a case has been referred to a grievance panel for consideration, the Vice-president for Professional Responsibilities will select three individuals from the roster to serve on the panel. In making these selections, the Vice-president for Professional Responsibilities will appoint members who, in her or his opinion, have the necessary expertise to evaluate the complaint properly. The Vice-president for Professional Responsibilities will also attempt to avoid any conflict of interest or appearance thereof. The three members of the grievance panel will choose one of their number to act as Chair of the grievance panel.

2.3. The grievance panel will conduct an investigation, prepare a report, and recommend one of several possible courses of action: dismissal of the complaint; a remedy which is agreed upon by the panel and the individual who allegedly violated the Code; or, only if all attempts at amicable conciliation fail, referral to an arbitration panel.

2.4. The Chair will establish a calendar for the investigation process and inform all interested parties. The investigation will be conducted expeditiously and, to the extent possible, in confidence. The Chair of the grievance panel will have authority to establish the procedures by which the panel will conduct its business.

2.5. Once the complaint has been referred to a grievance panel, the individual who allegedly violated the Code is entitled to be represented by any individual of her or his choice and is entitled to have access to all relevant materials and documents.

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## III. ARBITRATION PANEL

3.1. The arbitration panel will consist of three members: one arbitrator appointed by the Vice-president for Professional Responsibilities, one arbitrator chosen by the individual archaeologist against whom the complaint was made, and a third arbitrator to be selected by the first

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two arbitrators. If the two arbitrators are unable to agree in their selection of a third arbitrator within 60 days, then the Vice-president for Professional Responsibilities will select the third arbitrator.

3.2. The Chair of the grievance panel or an individual appointed by the Chair will act as AIA Presenter. Both the AIA Presenter and the individual archaeologist who allegedly violated the Code may present evidence, including witnesses, may cross-examine the other party's witnesses, and may be represented by legal counsel. The AIA will bear any costs incurred by the AIA Presenter, and the individual archaeologist who allegedly violated the Code will bear her/his own costs.

3.3. The panel of three arbitrators will decide the issue and their decision, by majority vote, will be final and binding. The arbitration panel will have authority to propose a solution ranging from dismissal of the complaint to termination of membership in the AIA and relevant privileges of membership.

3.4. If the individual archaeologist against whom the complaint was brought fails to respond to the initial inquiries of the Ombudsperson or fails to abide by the decision of the arbitration panel, this will be grounds for termination of AIA membership.

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#### IV. FORMAL RESOLUTION

Every effort will be made to resolve the grievance at either the first or second phase and with respect for confidentiality. At every phase, all possible steps will be taken to avoid conflicts of interest or the appearance of conflicts of interest and to protect the legitimate concerns and rights of all individuals involved in the matter.

4.1. If at any time, the individual who allegedly violated the Code chooses to resign from the AIA, then all grievance proceedings will be terminated.

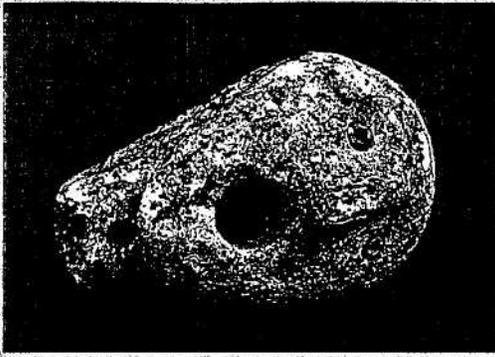
4.2. An individual who resigns from the AIA while a complaint is pending against her or him may not apply for membership in the AIA for at least three years from the time of the resignation. Any membership application of an individual who resigned while a complaint was pending against him or her must be submitted to the Vice-president for Professional Responsibilities for review and recommendation as to whether and on what terms the application may be accepted.

4.3. The Ombudsperson will report each year to the Governing Board on the number of complaints filed, brought to completion, and dismissed. This report may be printed in the AIA *Newsletter* at the discretion of the Executive Committee.

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**M**ore than bones were disturbed when relic hunters dug up Slack Farm in western Kentucky in late 1987, unearthing Indian grave goods like this 500-year-old human effigy pipe—reportedly bought by a collector for \$4,500.



Shawnee-Delaware Indian Robert Thomas, who protests grave robbing, raises an offering of tobacco over the plundered burials. The incident spotlights a controversial question...



# Who Owns Our Past?

By HARVEY ARDEN  
NATIONAL GEOGRAPHIC SENIOR WRITER  
Photographs by STEVE WALL

**T**HE CRIME SCENE—a field in western Kentucky—looked for all the world as if a low-flying squadron of bombers had just swooped over on a practice run. More than 450 small craters, each edged by a mound of raw earth, pocked the surface of the unplanted field. But no air raid caused this destruction. It was the work of . . . but how to refer to them? Some call them relic collectors, pothunters, treasure seekers, even “para-archaeologists.” Others, less forgiving, castigate them as looters, desecrators, even commercial grave robbers.

By whatever designation—and for whatever motives—the ten men who dug into this field in late 1987 disturbed more than bones and Indian relics. They ripped out and crumpled an irreplaceable page of our common heritage—and raised in high relief the growing controversy over the looting, sale, and exhibition of Native American remains and grave goods. The incident has prodded the nation to ask itself the emotionally charged question: “Who owns our past?”

Miles Hart, retired detective sergeant of the Kentucky State Police, recalls:

“We got a report that some relic hunters were looting an old Indian burial ground on a farm in Union County. Headquarters sent me out to check, since any discovery of human remains has to be filed with the state.

“Now, surface collecting is a popular hobby in this area. A lot of folks have relics or arrowheads. People dig ‘em up in their gardens and plow ‘em up in their fields. Twenty years ago

I used to pick up arrowheads myself—with permission—out of that same field. Before Mrs. Slack died and the farm was sold, she talked to me about the history of the property. I’m still interested in Indian culture, but now I carve copies of peace pipes instead of looking for real ones.”

When Sergeant Hart drove out to investigate, two men came to talk with him at the farm gate but refused to let him on the site. Returning with a search warrant, he found that a water tank had been rigged with a hose for softening the drought-parched earth. Countless small probe holes punctured the brown topsoil of the 40 acres overlooking the Ohio River near Uniontown, Kentucky.

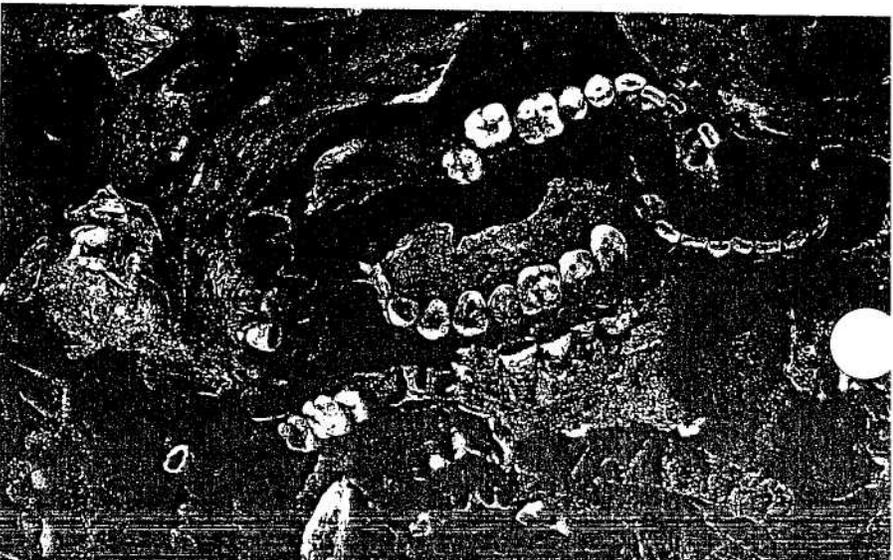
“The men had told me there weren’t any human bones; it was a prehistoric campsite, not a burial ground; they had rights to dig, and I had no business there since it was private land. But looking at all those craters, well . . . I knew amateurs don’t destroy whole sites like that. These people were literally mining the place. It had every sign of a commercial operation.”

Sergeant Hart did find bones—clearly human—strewn among the craters. “There were jawbones, leg bones, finger bones, human teeth everywhere. We got a cease and desist order until we could figure out which laws had been broken.”

The men had paid the landowner \$10,000 to lease digging rights between the fall harvest and spring planting. The ten were charged by the state of Kentucky with “desecration of a venerated object”—a statute applied to crimes ranging from



*Leasing digging rights on Slack Farm, ten men spent two months cratering this field for Indian artifacts before being stopped and charged with “desecration of a venerated object.” Kentucky, unlike many other states, prohibits the unauthorized digging of any graves.*



## Investigating the crime scene

**F**or three months in early 1988 archaeologists and volunteers meticulously sifted mounds of earth (above left) around more than 450 holes dug by the looters. The twofold purpose: to gather evidence for the state's criminal and civil cases and to glean what archaeological data could be had from the debris.

Few artifacts were found amid what the looters had cast aside—mostly pottery sherds and shattered bones. A bear pelvis (left) shows a hole from a digger's probe. Human jawbones and teeth (above) were among the remains of at least 650 of the graves disturbed. Analysis of the remains will show much about the people's diet and health. After study at the University of Kentucky and the state medical examiner's office, the bones were given to Native Americans for ceremonial reburial.

toppling tombstones on Halloween to Ku Klux Klan cross burnings—a misdemeanor that was punishable by a maximum fine of \$500 and as much as a year in jail. Four of the ten men, however, lived in Illinois or Indiana and couldn't be extradited for a misdemeanor.

Spurred by the event, the Kentucky Legislature in March 1988 unanimously revised the law, making desecration of graves a felony—which would allow extradition in future cases. Another bill narrowly missed passage in Indiana—where grave looters can be

prosecuted only for trespassing, a misdemeanor carrying a fine as low as one dollar. But supporters of the bill promise to push for a stronger law this year.

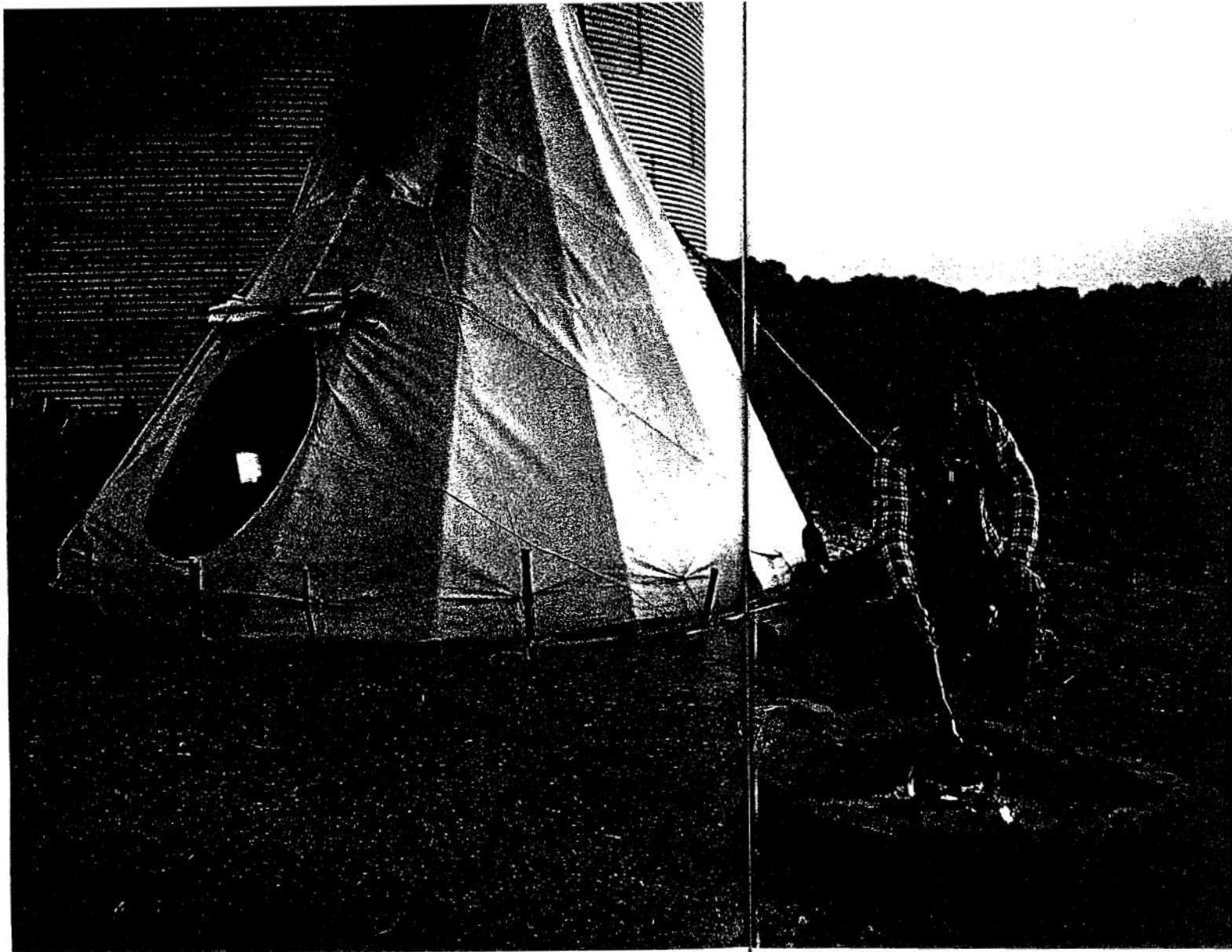
**A**S OF THIS WRITING the criminal trial of the "Slack Farm Ten" has been delayed. A parallel civil suit filed by the state (seeking return of artifacts taken from the site, costs of documenting the looting, and punitive damages for the destruction of an archaeological resource) was dismissed in August because Kentucky

failed to prove jurisdiction.

Some predict the United States Supreme Court may have to resolve the issue of the state's power to regulate archaeological excavations versus landowner's rights (a cherished Kentucky principle says a property owner's rights go "from heaven to hell"). "If the diggers are found guilty in the criminal case," points out David Wolf, forensic anthropologist of the Kentucky medical examiner's office, "the provisions of ARPA (the Federal Archaeological Resources Protection Act of 1979), which only apply on private property if

*National Geographic, March 1989*





*Guardian of Indian interests, Chico Dulac camped out in a TV-equipped tepee at Slack Farm to turn away unauthorized sightseers. A loosely organized*

*Native American contingent also held ceremonies and built a sweat lodge to purify participants.*

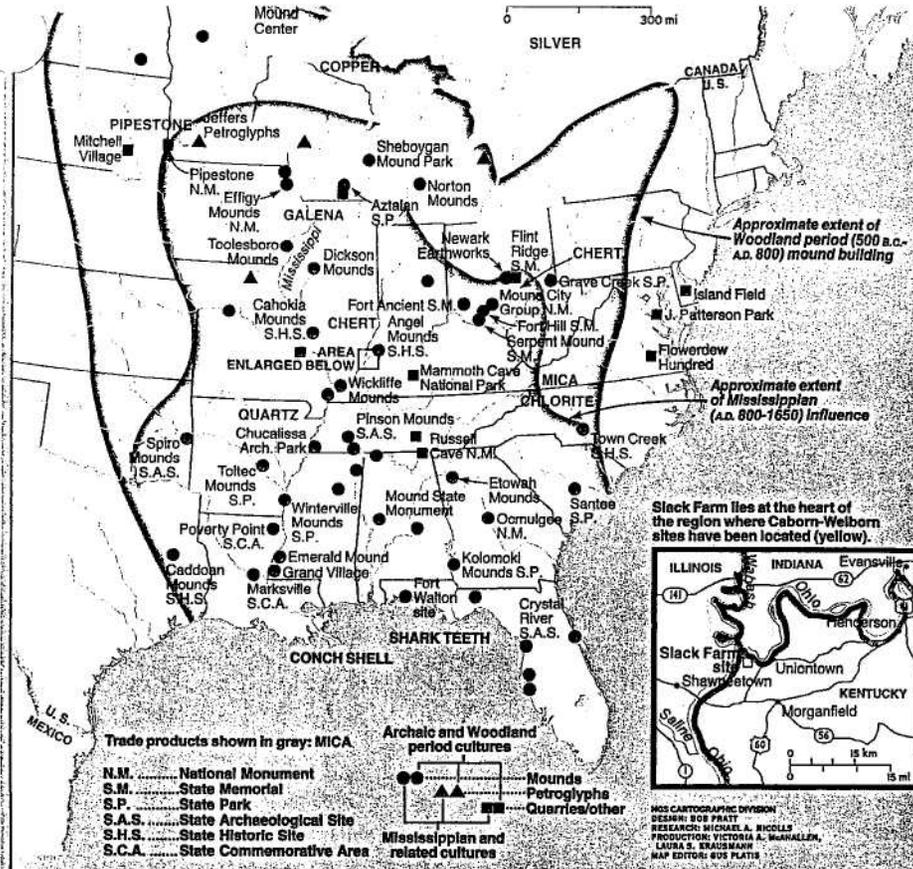
local law has been violated, would kick in. Then the FBI could go in and seize artifacts that had been illegally taken across state lines.

"Because of the scale of the Slack Farm operation and the diggers' brazen disregard for human sensibilities, we're hoping this case will spur a national burial preservation act," concludes Dr. Wolf.

Pleading not guilty, the ten defendants are backed by an influential lobby of relic collectors who see a cherished hobby (and profitable business) threatened by proposed laws and new legal precedents. Art Gerber, organizer of an annual Indian relic show in Kentucky, argues in their defense: "These guys are being made the scapegoats for what others have done for years. If it weren't for collectors, a lot of this stuff would be totally lost—plowed into pieces by farmers, washed away by floods, paved over for parking lots and housing projects. We collectors see ourselves as saving history, not destroying it."

Cheryl Ann Munson, senior archaeologist at Indiana University's Glenn A. Black Laboratory of Archaeology, counters: "It's one thing for a collector to pick up points in a field; it is entirely different to dig into archaeological sites to mine artifacts for money. The really sad thing is that we'll never know what's been taken or how it relates to what remains in the ground. Everything has been scrambled. This field is one of the prime Mississippian sites of the Ohio River Valley from the time of European contact. Now much of what we could have known is lost forever."

In February archaeologists, who had been called in by the state medical examiner's office to determine how many of the burials had been disturbed (at least 650, probably



## Cultural treasure: private or public domain?

The excavation and study of archaeological sites in the eastern United States (above) have revealed much about the Archaic, Woodland, and Mississippian periods.

Thousands of sites from millennia of occupations dot the terraces overlooking the Mississippi and Ohio Rivers—prime locations that offered good transportation, excellent hunting and fishing, and rich alluvial soil for growing corn.

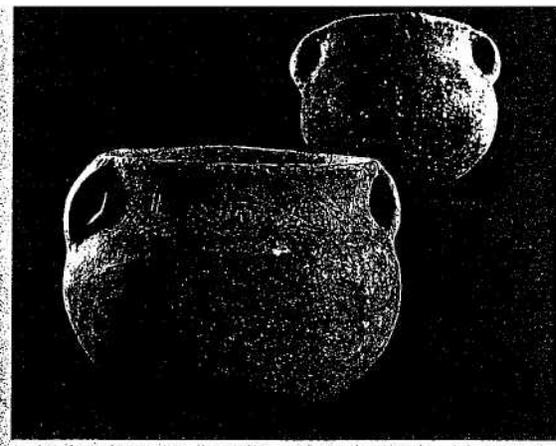
Undisturbed strata at the Slack Farm site show major

occupations from about 200 B.C. to about A.D. 1650. The last settlement—probably flourishing when Columbus made his New World landfall—belonged to the Caborn-Welborn phase (about 1450-1650) of the late Mississippian period. Only a handful of Caborn-Welborn village sites are known—all have been damaged by looters.

The Slack Farm looting and other incidents across the nation may lead to new legislation in many states—perhaps even a federal law—to safeguard

burial sites located on private land, raising a series of yet to be resolved legal questions:

Can a landowner give or sell digging rights to relic hunters? And who should have a say in regulating the digging of burial sites: The landowner? The state? The federal government? The archaeologists and museum curators? The descendants of those whose bones and grave goods they are—specific Indian tribes or all Indians? All Americans who claim the history of their land as part



of their national legacy? Among the few intact artifacts recovered by archaeologists at Slack Farm, two burial pots (above) show the characteristic shape and handles of the Caborn-Welborn culture. Also overlooked by the looters was a fragment of a tiny pot (below), perhaps made by a child while the mother was firing larger bowls and pots; in a hauntingly human touch, the child's centuries-old fingerprint can still be seen inside the bowl.

Whatever else may have been pirated away from the site will be all but useless for archaeology. Even if an artifact ends up on a dealer's table or in a private collection—like



this red cattinite pipe (above), allegedly from Slack Farm—it will remain forever out of context, a displaced piece of the puzzle of our cultural heritage.



egan mapping the site had hundreds of volunteers to help with the effort," said archaeologist David Poll of the Kentucky Heritage Council, which coordinated the operation. "They were local students, businessmen, retired folk—everyone outraged by what they saw." After all the publicity some people who had dug up bones in the past turn them in to the medical examiner's office. There was even talk of turning the Slack Farm site into a park.

**W**HAT DO archaeologists know of this Slack Farm site? far back as 1858, amateur archaeologist Sidney Lyon of nearby Jeffersonville, Indiana, donated some Indian relics he had dug up around there to the Smithsonian Institution. A decade later, Lyon—then time officially sponsored by the Smithsonian—conducted a thorough survey, noting:

"There is a great field for investigation on both sides of the Ohio, near the mouth of the Wabash River. The people of this country have little or no exact information as to the number, location of the mounds. When a field is cleared inclosing a mound, and bones are ploughed up, the fact becomes known, but the existence of mounds is almost unknown; and as they are undoubtedly very numerous an explorer would find work enough to do."

Among the five mound groups mapped by Lyon was a concentration of more than 40 mounds at Slack Farm. Some he dug as best he could—with the rudimentary archaeological techniques of the time—and dutifully sent findings to the Smithsonian Institution. His report on this material helped provide clues on the dating at

002304

nature of ancient human occupation here—and possibly led the looters of 1987 to the site.

"This was no temporary camp without burials, as the looters claimed," notes Cheryl Ann Munson, one of the archaeologists directing last spring's investigation. "It was a major village that flourished from about A.D. 1450 to 1650. Its people belonged to the Caborn-Welborn phase of the late Mississippian period—an important protohistoric era spanning the time of first contact with Europeans. Pre-Mississippian settlements here include a much older Woodland phase—we call it Crab Orchard—that dates back to about the time of Christ."

At the height of the Mississippian period (A.D. 900 to 1400) towns and villages, with flat-topped mounds serving as foundations for nobles' dwellings or temples, covered much of

eastern North America. Archaeologists characterize the culture of the Mississippian people as one based on the cultivation of corn. Hence the location in rich river bottomlands of its greatest settlements: Cahokia Mounds in Illinois, near East St. Louis; Angel Mounds, near Evansville, Indiana, just 22 miles upriver from Slack Farm; and Moundville, near Tuscaloosa, Alabama.

The Slack Farm site likely drew importance from the confluence of two great rivers—the Ohio and the Wabash. In the late Mississippian, say A.D. 1500, it would have presented a scene of closely packed rectangular houses of wattle-and-daub construction, with peaked thatch roofs to handle the midwestern rains; extensive cornfields on alluvial bottomlands; and perhaps 300 to 500 people.

When they died, they were

buried in cemeteries near their houses and granaries, with grave goods perhaps to assist them in the spirit world.

By drawing on data from other contemporary sites as well as analogies from the ways of the Choctaw, Creek, Shawnee, and other historical tribes, one can visualize many vignettes of Mississippian life: Men in river clearings burning great logs felled with stone axes, then hollowing them with adzes to make dugout canoes; others along the shore fishing with weighted nets; small hunting groups in the forested higher terrain away from the river, hunting white-tailed deer; children shaping play pots while their mothers built real ones; dogs yapping and cavorting; men and women making flint tools, weaving, repairing houses, carving stone pipes. And pervading the ancient settlement at Slack Farm as thoroughly as the acrid woodsmoke from the cooking fires, a deeply rooted belief system links the visible world to a supernatural universe.

**T**HAT BELIEF SYSTEM still persists in the person of Native American activists who arrived on the scene in Union County after they heard about the Slack Farm looting. Outraged at the desecration, they visited the site with Kentucky authorities and later claimed the skeletal remains under a "friend of the deceased" provision of state law.

Their claim was recognized by David Wolf of the state medical examiner's office—who played a crucial role in bringing the criminal case to prosecution. He agreed to give the Indian activists the bones for ceremonial reburial after criminal evidence had been gathered and the scientific analysis had been completed.

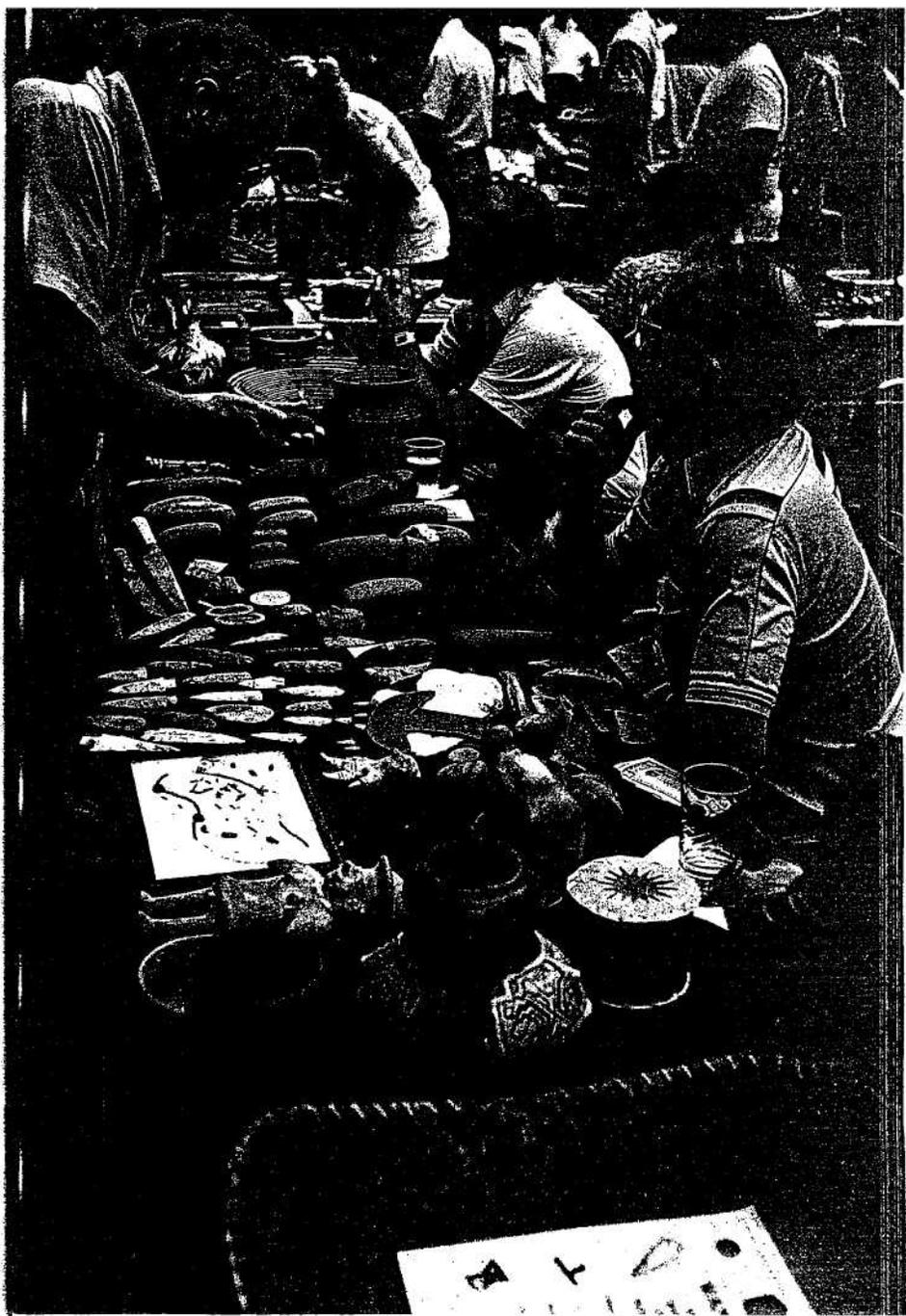
Among the factions of the



*Marching against desecration of burials and the buying and selling of grave goods, Indians and non-Indians join for a demonstration outside a hotel holding an annual Indian relic show in Owensboro, Kentucky. Within the hotel's exhibition hall (facing page), dealers offer buyers the scattered remains of more than 10,000 years of North American history.*

*Once almost universally viewed as an innocent hobby, relic collecting has come under increasing criticism as profit-driven dealers spur pothunters to ever greater depredations.*

*One controversial solution: a national law limiting commercial trade of such artifacts.*



urred by the Slack Farm case, Kentucky's legislature passed all upgrading desecration of a burial site from a misdemeanor to a felony. While Indian supporters and state legislative champion Senator John Hall look on, Governor Wallace Wilkinson signs the bill into law. Onetime "surface hunter" Ed Hastings of Henderson, Kentucky—displaying some old finds (facing page)—has given up all collecting now. His advice to those with a yen for Indian relics: "Don't dig!"



loosely organized Indian contingent were several Shawnee from Oklahoma, who were convinced their direct ancestors had lived in this area before being driven out in the early 1800s. Others were Cherokee, Sioux, Ojibwa, Apache, even Alaska Athapaskan.

Faced with the Shawnee's contention that the Slack Farm site had been a Shawnee village, the archaeologists contacted tribal officials of the Shawnee in Oklahoma and the Miami in Indiana. Neither group claimed descent nor grave goods.

"I do not believe that the modern Shawnee descended from the people buried here," says Cheryl Ann Munson. "Only with an extensive excavation and full-fledged study of the remains can we learn more and answer the descent question."

But Native American activists counter that the archaeologists simply don't want to deal

with modern Indians who might interfere with their work and make claims to the grave contents—and to many museum collections, as well.

Experts agree that the Shawnee once lived in this region. Shawneetown, Illinois, is only ten miles from Slack Farm, and this whole tri-state area—where Kentucky, Indiana, and Illinois converge—is rich in Shawnee associations. Some historians place the Shawnee farther up the Ohio River during the 1500s and 1600s, arguing that they only passed through here in the late 1700s before they were driven across the Mississippi. The authoritative *Archaeology of the Lower Ohio River Valley* (1986), by Jon Muller of Southern Illinois University, outlines a case for the Shawnee, among others, being the descendants of the Caborn-Welborn people.

And according to Dr. Helen Tanner, research associate at the Newberry Library in Chicago:

"There are only so many tribes who might be identified with the Caborn-Welborn culture, and the Shawnee, in my opinion, are the most likely. It seems to me that many archaeologists have developed a block in tying together historic tribes and prehistoric cultures; in reality it is all one continuum."

Says Dennis Banks, longtime American Indian Movement leader who came to Union County to lead the Indian contingent: "The archaeologists say nobody knows who the descendants of these people are. They say you can't tell if they were Shawnee because they're 'prehistoric.' That's their word for 'prewhite.' It seems they're saying we Indians can't have any ancestors at all. So that gives them the right to dig them up. If you ask me, they're hardly any better than grave robbers themselves; only difference is they've got a state permit. Well, we're here to tell the world that, Shawnee or not, we are all laying claim to these ancestors.

"What if this were a white cemetery that had been desecrated? Would the archaeologists be bagging the disturbed bones and grave goods to take them for study at museums and universities?"

"We're not here for a confrontation. We just want to see that the Ancient Ones get a proper reburial. Those who dug up their bones just don't understand the forces they've let loose."

The Indians set up a tepee and organized a vigil near the site, held tobacco-burning ceremonies every four days, and built a sweat lodge to purify those who came to visit the disturbed graves.

A poignant public Ancestors Day ceremony was celebrated over Memorial Day weekend—possibly to become an annual event. Two weeks earlier the



first of three consignments of bones was reburied—without fanfare—by Chiefs Leon Shenandoah and Vincent Johnson of the Six Nations Iroquois Confederacy.\*

A large cloud, sliding provisionally across the otherwise clear sky, gave welcome relief from the hot afternoon sun as Chief Shenandoah put the cardboard boxes containing the remains of 114 Ancient Ones into holes the archaeologists had left for that purpose. In his native Onondaga language, he intoned a series of prayers.

Later he explained: "I was talking to the disturbed spirits. They can't rest until their bones are completely dust. I asked them not to harm us. I told them we are putting them back so they can start their journey to the otherworld again. And I prayed that they would forget all this ever happened and not take vengeance on those who dug them up."

At the end of the prayers the dirt that the original diggers had tossed aside so carelessly and that the archaeologists had so meticulously sifted was shoveled back to cover the boxes in their new common grave, well beneath the plow zone. Smoothing the mound, Chief Shenandoah set a lighted lantern beside it.

"To light their way to eternity," he said.

**I**N OWENSBORO, Kentucky, tables groaning under the weight of tens of thousands of Indian artifacts stretch away through a vast ballroom lit by chandeliers. Billed as "The Indian Relic Show of Relic Shows," this annual event is enough to give terminal depression to anyone who knew the childhood miracle of finding an arrowpoint in the backyard.

Box after box is filled with points—you can get the

commonest arrowheads for 50 cents to a few dollars; a finely preserved Paleo-Indian spearpoint brings \$500 or more. A glass case displays exquisite bannerstones—the stone weights used with atlatls, the spear-thrower common before the bow and arrow came into vogue some 1,200 years ago. At one table a couple examine a shell pendant, a gorget dangling from a necklace of fine shell beads: \$1,200. "It's got the weeping-eye motif of the Southern Cult," urges the seller.

While most pieces bear no label other than price, some have little museum-style ID tags: "Yankeetown, A.D. 1200" . . . "Hopewell, 200 B.C.-A.D. 200."

"You won't find much of the really good stuff out in the open," one vendor confides. "That's kept in vaults. You gotta be serious before they'll show it to you. And watch out for fakes. Even the experts get fooled."

"Did you dig this piece yourself?" you ask the dealers. Most shake their heads.

"Naw, got it at an estate sale."

. . . "Bought it from a guy."

"Where's it from?" you ask.

"Well, this guy said he got it down in Georgia." Or Oklahoma. Or bought it from an old lady in Ohio.

Get too specific with your questions, and you get a peeved stare. It's like asking people details of their taxes.

"Anything from Slack Farm here?" That one brings either a blank look or a guffaw. Everyone at the show knows about the recent hoopla. Many items might be from the site—but there's not a whit of legal proof that any of them are.

Photographer Steve Wall managed to track down one piece allegedly from the Slack

\*The author wrote about the Iroquois Confederacy in the September 1987 NATIONAL GEOGRAPHIC.



PAINTING BY NATIONAL GEOGRAPHIC ARTIST WILLIAM H. BONE

## Cherished by kin —then and now

**S**imple possessions are placed in a grave by loving relatives in this artist's re-creation of a C&W burial—set amid thatched wattle-and-daub houses overlooking the Ohio River. These goods, perhaps meant to accompany the deceased in the afterlife, would centuries later lure pothunters to desecrate such graves.

Scattered bones from the Slack Farm site, boxed in accordance with state law after examination by physical anthropologists, receive a makeshift but reverent ceremonial reburial (right) by Chief Leon Shenandoah of the Six Nations Iroquois Confederacy.



n dig: a four-inch carved  
estone pipe (page 385). The  
collector knows of only two others,  
one also said to be from the  
farm and the other from a few  
miles away. The man who  
claimed he'd bought it—for  
\$4,500—said he had confirmation  
of its origin from the seller.  
Other rare pieces have gone for  
hundreds of thousands of dol-  
lars. Most diggers, though,  
would tell you they're lucky to  
make the equivalent of mini-  
mum wage for their hours of  
shoveling in the hot sun.

"For the vast majority it's the  
sport and adventure of it, not  
the financial gain," says Art  
Gerber, whose show is one of  
scores held throughout the coun-  
try each year. Yet some deal-  
ers—including Gerber himself—  
have collections in their vaults  
that would make a museum  
curator cry with frustration.  
Most of these pieces are what  
archaeologists call "without  
provenance"—no record of the  
physical context from which  
they were dug. Hence, they are  
nearly useless for the interpreta-  
tion of history. Literally, pieces  
lifted from the puzzle of our  
common past, never to be fitted.

**W**ATCH OUT for cop-  
perheads!" warned  
Ed Hastings as he  
led the way up the  
hillock behind Slack Farm. Ed  
has been roaming these bluffs  
and terraces above the lower  
Ohio for more than half a centu-  
ry. He was a "surface hunter,"  
making his finds on the ground,  
not under it. In recent years he's  
given up even that, becoming  
purely a mapper of Indian cemeteries  
and sites. "I've recorded  
more than 250 sites, some larg-  
er, some smaller than this one,  
all within a hundred miles of  
here. I guess there must be twice  
that many. Every so often some-  
one will come across an old  
Paleo-Indian point out here

dropped by a hunter maybe  
10,000 years ago. Some of these  
ancient settlements are layered  
like wedding cakes, going down  
maybe a dozen feet.

"When those diggers dug  
here, they mixed up all the lay-  
ers and tossed the bones around  
like so much sewer pipe. No  
respect for the dead. I've found  
quite a few bones, too, in my  
time. Once I found the whole  
skeleton of a mastodon. But  
whenever I found human bones,  
I reburied them with a prayer.  
Maybe it's because I've got a  
drop of Apache blood. That  
was the only time I dug—to  
put 'em back.

"The diggers say they weren't  
digging for bones, just pots.  
But look at all those probe holes  
among the craters—thousands  
of 'em. You don't make those  
looking for pots at random.  
You'd never find much that  
way. You make all those probes  
because you're looking for the  
soft feel of bones. If you find  
bones, chances are you're going  
to find grave goods too. That's  
where the money is. The only  
bones they usually take are the  
whole skulls—people buy 'em as  
candle holders.

"But I don't see these guys as  
monsters, like some people do,"  
Hastings continued. "I know  
the lure. I stopped even surface  
huntin' because I came to real-  
ize it was wrong to take this  
stuff for yourself. This is every-  
body's history, not just yours or  
mine. It shouldn't be for person-  
al profit. I'm not tellin' others  
to stop surface huntin' or col-  
lectin'. But I do say this:

"Don't dig—you destroy his-  
tory when you do. And don't  
buy the stuff either. If every-  
body stopped buyin', these guys  
would do a lot less destruction.  
Me, I still hunt for sites but  
only with my eyes. Those bones  
down there—they're everyone's  
ancestors. I say let 'em rest  
in peace!" □

For me it is a miracle of  
miracles that any rem-  
nant of the human past  
has survived, for it seems that  
both nature and man are con-  
stantly engaged in the pro-  
cesses of obliteration.

That's why I was heartened  
recently when museum tech-  
nician Susan Crawford guided  
me through the Smithsonian  
Institution's storage facility in  
Silver Hill, Maryland, where  
the copper bells, pottery, and  
other artifacts found at the  
Slack Farm site by Sidney S.  
Lyon more than a century  
ago are stored.

The experience thrust a ray  
of hope into the grim affair at  
Slack Farm. Here were arti-  
facts that could be assigned to  
that place and to a particular  
time. They had been pre-  
served not only for the present  
but also for the future because  
Lyon and a public institu-  
tion—the then infant Smithso-  
nian—had collaborated to  
save them. Such foresight is  
increasingly rare.

The disaster that took place  
at Slack Farm lies in the ir-  
revocable destruction by a few  
of part of the heritage that be-  
longs to us all. The world will  
never know for sure just what  
artifacts came out of that cha-  
os, and the knowledge they  
would have afforded is lost.  
Therein lies the crucial differ-  
ence between the "amateur  
archaeology" of Lyon, and  
the irresponsible greed of the  
recent looters.

Tragically, the Slack Farm  
case is not unique; it is not  
even unusual when we look at  
it from a wider perspective.

In 1933 a small group of  
men, who had hastily estab-  
lished themselves as the  
Poccola Mining Company

thoroughly sacked the great  
mortuary mound that domi-  
nated the Spiro site in southeastern  
Oklahoma.

In New Mexico virtually  
every site of the Mimbres—  
a people of the Mogollon  
culture—has been wrecked by  
looters seeking their delicately  
painted black-on-white bowls.  
In North Carolina the strata of  
7,000 years of human occupa-  
tion lie in a jumble, destroyed in  
a matter of days by seekers of a  
few "collectible" stone spear-  
points and scrapers.

As an archaeologist I deplore  
the ongoing destruction, for my  
profession literally depends on  
the excavation of in situ materi-  
al—remains of the past in the  
precise place where they were  
left by those who made and used  
them. The artifact out of context  
is, for the most part, of as little  
use as the beached plank of a  
wrecked ship.

I became a collector at the age  
of 13. In fact, the finding of  
several spearheads in a plowed  
South Carolina field played a  
major part in my later desire  
to become an archaeologist.

It seemed quite natural that  
my surface collecting evolved  
into sporadic digging at local  
mound sites. It is easy, looking  
back, to see the destruction that  
this wrought. At the time, how-  
ever, I was sincerely interested  
in the "person behind the arti-  
fact" and felt strong pride in our  
local prehistoric sites. In addi-  
tion, South Carolina then had  
no professional archaeologists.  
When they finally did come on  
the scene, I freely shared both  
my collection and my somewhat  
sketchy records. I continue to  
believe that such coopera-  
tion between scientists and lay-  
persons can save an enormous  
amount of time and duplication  
of effort.

Money entered the collecting  
picture when, in a world of  
increasing demand and limited  
supply, dealers began to assign  
prices to the priceless, and the

market grew to depend on more  
and more digging for salable ob-  
jects. Artifacts too often became  
the pawns in business games,  
either as investments or as lucra-  
tive tax deductions. With that  
the image and the innocence of  
collecting were severely compro-  
mised, as in the Slack Farm  
case. In the ongoing competi-  
tion, archaeologists face an up-  
hill battle even to save what is  
in the ground for future gener-  
ations. In my opinion, if the  
unchecked looting continues



NATIONAL GEOGRAPHIC PHOTOGRAPHER  
VICTOR A. ROWELL, JR.

to increase, there will be no  
archaeology to do by the turn  
of the century!

But don't archaeologists  
themselves destroy this ancient  
evidence as they excavate? Of  
course, but there are key differ-  
ences. Archaeologists are first  
and foremost anthropologists,  
trained in the methods necessary  
to interpret the relationships  
among the buried remnants of  
the past and obligated to publish  
their findings. Moreover, the  
artifacts found by archaeologists  
as a rule end up in museums or  
other public repositories, avail-  
able to all.

The issue of the reburial of  
human remains underscored by  
the Slack Farm episode is in a  
different category of concern.  
Many Native Americans deplore  
any disturbance of the grave

ancient Americans,  
saying that archaeologists  
"respect our dead." This reac-  
tion should not be surprising:  
The remains of hundreds of  
thousands of North American  
Indians and their distant an-  
cestors lie in museums around the  
nation. Until recently many  
laws pertinent to the exhumation  
of human bones applied  
only to whites.

Archaeologists counter with  
their own need to study huma-  
n remains in order to reconstruct  
ancient diet and patterns of dis-  
ease. Fortunately, important  
compromises are being reached.

In May 1986 the executive  
committee of the Society for  
American Archaeology—the  
principal professional organiza-  
tion for anthropological  
archaeologists—recognized  
"both scientific and traditional  
interest in human remains," a  
that "human skeletal material  
must at all times be treated with  
dignity and respect."

Meanwhile, immediate prac-  
tical solutions on the use, the  
treatment, and, indeed, the ve-  
lvet ownership of the past are elu-  
sive. Antiquities laws are vague  
and conflicting; enforcement is  
costly and time-consuming.  
New and effective legislation  
against looting is difficult to  
enact, with the "right to collec-  
as the point of contention.

The best answer would seem  
to lie in public education, so that  
people can know of our rich col-  
lective past and the threats to  
it. Decisions and compromises  
affecting both the past and the  
rights and concerns of all parti-  
might then be easier to effect.  
This may take more time than  
we have. The tangible roots of  
our past may soon vanish and  
join the shameful roster of all  
else we have destroyed on earth.

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