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

UNITED STATES OF AMERICA, Plaintiff, v. **RULON KODY SOMMERVILLE**, Defendant.	**MEMORANDUM IN SUPPORT OF MOTION FOR JURY INSTRUCTION OR, AS ALTERNATIVES, TO DISMISS THE INDICTMENT OR DECLARE STATUTE UNCONSTITUTIONAL** Case No. 2:09 CR 00289 DS Judge David Sam

INTRODUCTION

To guard against convicting an innocent person, this court must construe the Archaeological Resources Protection Act ("ARPA") to require proof that defendants charged under that statute know that the artifacts they seek to sell are protected under ARPA. *See* 16 U.S.C. 470ee. Any other construction would allow persons who merely possess a protected artifact to be convicted regardless of whether they knew of the artifact's origin and protected status. For this reason, Defendant Rulon kody Sommerville, requests a jury instruction that requires the government to prove beyond a

reasonable doubt that Mr. Sommerville actually knew that the artifacts he is accused of selling or seeking to sell were "archaeological resources" as defined under 16 U.S.C. § 470ee.

Should this court conclude that § 470ee does not require knowledge of an artifact's protected status, this court must dismiss the Indictment for failing to state a crime. Criminal defendants have a constitutional right to be charged only after the government presents to a grand jury evidence of every element of an offense. The government must then detail those elements in an indictment. Contrary to these requirements, the Indictment does not specify the element of knowledge that the artifacts fell under ARPA's protections. The government appears to have further violated Mr. Sommerville's rights by failing to present any evidence to the grand jury that Mr. Sommerville knew that the artifacts were protected. These evidentiary and charging errors require dismissal.

Similarly, should this court construe ARPA as not requiring knowledge that artifacts are protected then ARPA unconstitutionally criminalizes innocent conduct. Under the government's apparent view of the statute, anyone who comes into contact with an archaeological resource commits a crime regardless of their intent or knowledge. This approach would impose a strict liability crime in violation of due process principles. As a general rule, due process of law demands that a person have a criminal intent or knowledge to be convicted of a crime. Strict liability offenses are reserved only for

regulatory crimes, public welfare offenses, and underage sexual activity. ARPA does not fall into any of these categories.

I. TO AVOID CONVICTING AN INNOCENT PERSON, THIS COURT MUST INSTRUCT THE JURY THAT THE GOVERNMENT MUST PRESENT EVIDENCE THAT MR. SOMMERVILLE KNEW THE ARTIFACTS WERE PROTECTED BY STATUTE.

ARPA targets persons who seek to sell ancient artifacts, knowing that the objects are protected under federal law. That statute criminalizes various transactions involving ancient artifacts on federal lands:

> (a) Unauthorized excavation, removal, damage, alteration, or defacement of archaeological resources. No person may excavate, remove, damage, or otherwise alter or deface, or attempt to excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands or Indian lands unless such activity is pursuant to a permit issued under section 4 [16 USCS § 470cc], a permit referred to in section 4(h)(2) [16 USCS § 470cc(h)(2)], or the exemption contained in section 4(g)(1) [16 USCS § 470cc(g)(1)].
>
> (b) Trafficking in archaeological resources the excavation or removal of which was wrongful under Federal law. No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange any archaeological resource if such resource was excavated or removed from public lands or Indian lands in violation of--
> (1) the prohibition contained in subsection (a), or
> (2) any provision, rule, regulation, ordinance, or permit in effect under any other provision of Federal law.
>
> (c) Trafficking in interstate or foreign commerce in archaeological resources the excavation, removal, sale, purchase, exchange, transportation or receipt of which was wrongful under State or local law. No person may sell, purchase,

> exchange, transport, receive, or offer to sell, purchase, or exchange, in interstate or foreign commerce, any archaeological resource excavated, removed, sold, purchased, exchanged, transported, or received in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law.
>
> (d) Penalties. Any person who *knowingly* violates, or counsels, procures, solicits, or employs any other person to violate, any prohibition contained in subsection (a), (b), or (c) of this section shall, upon conviction, be fined not more than $ 10,000 or imprisoned not more than one year, or both: Provided, however, That if the commercial or archaeological value of the archaeological resources involved and the cost of restoration and repair of such resources exceeds the sum of $ 500, such person shall be fined not more than $ 20,000 or imprisoned not more than two years, or both. In the case of a second or subsequent such violation upon conviction such person shall be fined not more than $ 100,000, or imprisoned not more than five years, or both.

18 U.S.C. § 470ee (emphasis added).

The knowing requirement under subsection (d) is essential to protect against innocently handling a protected resource under ARPA. The few courts that have addressed this issue have concluded that knowledge of an artifact's protected status is required or, at the very least, can be inferred based on the facts. The Ninth Circuit has addressed the applicability of § 470ee as applied to a person who discovered a human skull while hunting. *United States v. Lynch* 233 F.3d 1139 (9th Cir. 2000). The skull turned out to be from an indigenous person that was protected under § 470ee. *Id.* at 1139-40. The Ninth Circuit ruled that merely finding a human skull was insufficient to support a conviction under § 470ee, otherwise, any innocent person who happens to come across

human remains would be guilty of a crime even if that person has no inkling that the remains are protected under ARPA. *Id.* at 1143. Under these circumstances, the law cannot presume a person to know the origins or protected status of the remains.

Like the defendant in *Lynch*, although Mr. Sommerville possessed protected artifacts, neither the indictment nor the evidence addresses his knowledge of the artifacts' protected status or origins. Thus, the government must present some evidence that Mr. Sommerville knew that the artifacts were protected. A jury instruction to that effect would ensure that the jury only convicts if Mr. Sommerville in fact knowingly possessed and tried to sell illegal objects. Absent an instruction, an innocent person could be convicted.

The two other courts that have addressed the knowledge requirement confirm this analysis. The only other circuit to address the knowledge requirement under ARPA is the Tenth Circuit in *United States v. Quarrell*, 310 F.3d 664 (10th Cir. 2002). In that case, the government charged the defendants with violating § 470ee(a) for excavating archaeological resources on government land. *Id.* at 668-69. The defendants argued that the government had the burden or proving that the defendants knew that the land upon which they were digging was protected under ARPA. *Id.* at 669. The Tenth Circuit disagreed and ruled that the government need not prove knowledge of protected lands because "a person excavating on someone else's land, whether public or private, cannot reasonably expect to be free from regulation." *Id.* at 672. In other words, the mere fact

that a person digs on land that someone else owns cannot be viewed as "an innocent act." *Id.*

Quarrell's analysis supports requiring knowledge that the artifacts were protected under § 470ee. According to the Tenth Circuit, a person who excavates on another person's land assumes the risk that any objects found are protected under the law or that they belong to someone else. *Id.* In reaching this conclusion, the Tenth Circuit cited *Lynch* and distinguished excavation from finding an object on another person's land: "Requiring a defendant to know the object he is removing is an archaeological resource protects against convicting the casual visitor, like a Boy Scout, who picks up an object unaware that it is a prehistoric artifact." *Id.* at 673. Thus, *Quarrell* concluded that merely possessing an artifact is not enough to convict under § 470ee. Rather, knowledge that the object is protected under federal law is required.

Eliminating any doubt about the limits of its decision, *Quarrell* also distinguished two United States Supreme Court cases that inferred knowledge requirements in statutes that did not specifically provide for a mens rea element. First, in *Staples v. United States*, 511 U.S. 600, 610-11 (1994), the High Court ruled that to convict a person for possessing an unregistered assault weapon required the government had to show that the defendant knew that the weapon fell within the ambit of the applicable statute. Second, in *United States v. X-citement Video, Inc.*, 513 U.S. 64, 72-74 (1994), the Court required knowledge that persons portrayed in pornographic pictures were actually minors. In both cases, the

Supreme Court concluded that a knowledge requirement was necessary because possessing a gun or sexually-oriented pictures are innocent activities by themselves. *Staples*, 511 U.S. 610-11; *X-Citement Video*, 513 U.S. at 72. The driving force behind these decisions was the Court's concern that the statutes could criminalize a broad range of "innocent conduct." *Staples*, 511 U.S. 610; *X-Citement Video*, 513 U.S. at 72.

The same concern arises in this case. Like the skull found in *Lynch*, the mere possession of an artifact may be perfectly innocent or unknowing. In fact, a person who goes to great lengths to ensure that the artifact is legal could still be convicted if selling an object under § 470ee(b) does not requirement knowledge of the object's protected status. Anyone who touches the object would be subject to prosecution under that theory. Thus, knowledge that the artifacts are protected by law is necessary to prevent convicting innocent persons.

The final case to address the knowledge requirement under § 470ee specifically adheres to this reasoned view of *Lynch* and *Quarrell*. In *United States v. Gallegos*, No. 2007CR1166 (D.N.M. May 30, 2008), the Federal District Court for the District of New Mexico construed § 470ee(b) in the case of an artifact collector who offered to sell his collection to a museum. Addendum A. That court applied the very same reasoning detailed above and held that absent a knowledge requirement, ARPA would support the defendant's conviction merely for "the legal act of buying pottery." Protecting the innocent requires evidence that the defendant knew that the artifacts were protected.

Consistent with these cases, Mr. Sommerville requests a jury instruction that requires the government to prove beyond a reasonable doubt that he knew that the artifacts he possessed were covered by ARPA. Absent that knowledge, he committed no crime. Rather, he innocently possessed objects that he believed were rightfully his.

II. THE GOVERNMENT FAILED TO ESTABLISH A CRIME BOTH BEFORE THE GRAND JURY AND IN THE INDICTMENT WHEN IT FAILED TO SPECIFY WHETHER MR. SOMMERVILLE KNEW THAT THE ARTIFACTS WERE PROTECTED.

Irrespective of a jury instruction, the government failed to present evidence to the grand jury that established every element of a crime under ARPA. The constitutional rights to a grand jury determination and an indictment require the government to present a quantum of evidence necessary to support a conviction. But, here, the government appears to have operated under the assumption that knowledge of the artifacts' origins and protected status was not required. Rather, it presented no evidence to the grand jury that Mr. Sommerville knew anything about the protected status of the artifacts. This failure violates Mr. Sommerville's constitutional rights and, therefore, requires dismissal.

The Federal Constitution protects criminal defendants against unfounded prosecutions by requiring prosecutors to present evidence of a crime to a grand jury which then details the elements of the crime charged in an indictment. "In federal prosecutions, 'no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury' alleging all the elements of

the crime." *Harris v. United States*, 536 U.S. 545, 549 (2002) (quoting U.S. Const. amend. V). The indictment must detail the elements of the crime sufficiently to place "the defendant on fair notice of the charges against which he [or she] must defend . . . ." *United States v. Dashney*, 117 F.3d 1197, 1205 (10th Cir. 1997). An indictment is sufficient if it sets forth the elements of the offense charged "'in the words of the statute itself, as long as those words themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.'" *United States v. Hathaway*, 318 F.3d 1001, 1009 (10th Cir. 2003).

Without specifying how Mr. Sommerville knowingly violated ARPA, the government escapes its duty to present evidence of a crime to the grand jury. The Indictment simply alleges that the defendants did "knowingly sell and offer to sell an archaeological resource" in violation of 18 U.S.C. § 470ee(b). This generic reference to knowing conduct fails to identify how Mr. Sommerville committed a crime. Instead, the government could have simply presented evidence to the grand jury that Mr. Sommerville sold or tried to sell a protected artifact. No mention of Mr. Sommerville's knowledge would be necessary. The government need not present any evidence of this essential element in violation of the Fifth Amendment. *Harris*, 536 U.S. at 549.

Similarly, the government's failure to specify what Mr. Sommerville knew violates the constitutional right to be charged by indictment. Here, the government simply quotes

the knowing requirement under § 470ee without specifying what Mr. Sommerville knew. Where, as here, a statute defines a crime in "'generic terms,'" the indictment is "'not sufficient'" to charge the defendant. *United States v. Sullivan*, 919 F.2d 1403, 1411 (10th Cir. 1990) (quoting *Russell v. United States*, 369 U.S. 749, 765 (1962)). Rather, the indictment must specify the elements with particularity. *Id.* The government employed no specifics here. Accordingly, this court must dismiss the Indictment for failing to state a crime.

III. THE ABSENCE OF A KNOWLEDGE REQUIREMENT RENDERS THE STATUTE AN UNCONSTITUTIONAL STRICT LIABILITY OFFENSE.

Were this court to interpret § 470ee as not requiring any knowledge that artifacts are protected, that statute would be unconstitutional. The absence of a mens rea requirement would render the statute a strict liability crime. The Federal Constitution limits strict liability crimes to certain regulatory offenses that protect the public safety. But, applying that doctrine here to the ARPA, would ensare innocent persons while providing little public benefit. An intent requirement is thus constitutionally mandated.

In contrast to ancient artifacts, strict liability crimes are reserved for harmful materials that risk the public health or welfare. For the vast majority of crimes, criminal intent is a "universal and persistent" requirement of modern law. *Morrissette v. United States*, 342 U.S. 246, 250-51 (1952). The United States Supreme Court has only exempted from this requirement the regulation of "potentially harmful or injurious items."

Staples, 511 U.S. at 607. Under this reasoning, "as long as a defendant knows that he is dealing with a dangerous device" that requires responsible handling or care, the law allows punishment even absent an intent to violate the law. *Id.*

ARPA does not fit this criteria on at least two fronts. First, ancient artifacts are not inherently dangerous. Rather, although irreplaceable, they are harmless. Second, even under the strict liability doctrine, a person must know that the object is dangerous. *Id.* In contrast, construing ARPA as requiring no knowledge of the protected status of an object implicates innocent persons unlike others who possess dangerous items. Even strict liability crimes require that the defendant know the nature of the item before allowing a conviction.

Absent a criminal intent, ARPA unconstitutionally punishes innocent conduct. A person who merely possesses an artifact is guilty of a crime despite any knowledge that the artifact is protected by law. Applying strict liability here would ensare anyone who comes into contact with an artifact even if they, in good faith, believe that they are acting legally. An unscrupulous seller could even forge documents of authenticity that the buyer relies upon. Even though the seller affirmatively dupes others, anyone who touches the artifact, even unknowingly, would be guilty of a crime. The constitutional requirement of an intent to break the law protects against such unfair prosecutions. *Staples*, 511 U.S. at 607.

Moreover, the rule of lenity confirms requiring a criminal intent under ARPA.

That rule requires courts to construe ambiguous criminal statutes in favor of the accused. *Id.* at 619. Thus, if this court has any reason to question whether ARPA requires knowledge, the rule of lenity compels the conclusion that it does.

CONCLUSION

Because the ARPA requires guilty knowledge to avoid convicting innocent persons, this court should instruct the jury that the government must prove beyond a reasonable doubt that Mr. Sommerville knew that the artifacts were protected. In the alternative, the Indictment process violates constitutional standards because under the government's view, it need not present any evidence of knowledge and the Indictment itself fails to state the elements of a crime. At the very least, the absence of knowledge renders ARPA unconstitutional.

DATED this 28th day of May, 2010.

/s/ Henri Sisneros
HENRI SISNEROS
Assistant Federal Defender

CERTIFICATE OF DELIVERY

I hereby certify that on May 28, 2010, I electronically filed the foregoing **Memorandum in Support of Motion for Jury Instruction or, as Alternatives, to Dismiss the Indictment or Declare Statute Unconstitutional** with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

Carlie Christensen
Acting United States Attorney

Richard D. McKelvie
Assistant United States Attorney

Cy H. Castle
Assistant United States Attorney

/s/ Kristine Harris

ADDENDUM A

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

UNITED STATES OF AMERICA,

Plaintiff,

vs. No. 07 cr 1166 MCA

ROBERT V. GALLEGOS,

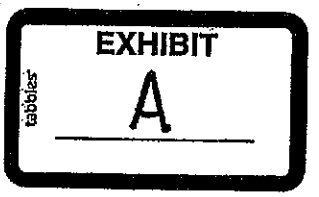
Defendant.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on *The United States' Motion in Limine Asking That Defendant, Robert Gallegos, Not Be Allowed To Present Evidence, or Argue As A Defense, That He Did Not Know The Navajo Grayware Pots He Purchased Came From Public Land* [Doc. 105], filed May 12, 2008. The Court held a hearing on the motion on May 28, 2008, during the Call of the Calendar for this cause. Having considered the parties' submissions, the relevant law, the arguments of counsel, and otherwise being fully advised in the premises, the Court denies the motion for the reasons set forth more fully below.

I. BACKGROUND

In the 1950s and 1960s, at a time when they were employed as oil camp workers in the Canyon Largo region near Bloomfield, New Mexico, Larry Moore and Orion Allen amassed a large collection of Navajo grayware pottery from pots, vessels, and jars that they removed from the area. The area where Canyon Largo is situated is known as the "checkerboard" for its mix of private, public, and tribal land.



Defendant Robert Gallegos is a collector and dealer of Native American artifacts. In the summer of 2002, he purchased pottery from the collections of Mr. Moore and Mr. Allen, paying Mr. Moore $10,200 for his pots and Mr. Allen $15,750 for his. Mr. Gallegos thereafter approached the Wheelwright Museum in Santa Fe to inquire about the museum's interest in acquiring his collection. A subsequent investigation by agents with the Bureau of Land Management ("BLM") into the provenance of the pottery ultimately led to Mr. Gallegos's being indicted,[1] on June 13, 2007, on five counts of unlawfully and knowingly selling, purchasing, exchanging, transporting, receiving, and offering to sell, purchase, or exchange archaeological resources[2] with a commercial and archeological value in excess of

[1] The Government superseded the indictment on February 27, 2008. Mr. Gallegos is now charged with having unlawfully and knowingly selling, purchasing, exchanging, transporting, receiving, and offering to sell, purchase, or exchange archaeological resources with a commercial and archaeological value in excess of $500.00, "which [resources he] knew to have been removed from public lands . . . without a permit issued under the Antiquities Act of June 8, 1906 (16 U.S.C. § 431-433)." [Doc. 68 at 1-2].

[2] The alleged archaeological resources are described as follows:

Count 1 - a Navajo grayware jar a Navajo grayware jar approximately 32.9 cm in height, inventoried by the BLM as Pot 2, taken from the Canyon Largo area, Global Positioning Satellite (GPS) coordinates N36 degrees, 36.545 minutes, W107 degrees, 40.926 minutes;

Count 2 - a Navajo grayware rounded jar approximately 48.2 cm in height, inventoried by the BLM as Pot 33, taken from the Canyon Largo area, GPS coordinates N36 degrees, 34.587 minutes, W107 degrees, 42.236 minutes;

Count 3 - a Navajo grayware conical vessel with constricted neck approximately 51 cm in height, inventoried by the BLM as Pot 32, taken from the Canyon Largo area, GPS coordinates N36 degrees, 32.077 minutes, W107 degrees, 39.382 minutes;

Count 4 - a Navajo grayware pot approximately 27.2 cm in height, inventoried by the BLM as Pot 8, taken from the Canyon Largo area, GPS coordinates N36

$500.00 without the necessary permit, in violation of 16 U.S.C. § 470ee(b)(2) and (d) and 18 U.S.C. § 2. [Doc. 1]. The area from which the pots were taken by Mr. Moore and Mr. Allen is known to historians and archaeologists as the Dinetah region. It is considered sacred by the Navajo people and also is considered to be their ancestral home.

On May 1, 2008, this Court noticed the matter for a jury trial scheduled to begin on June 10, 2008. In the notice, the Court directed the parties to file any motions in limine by May 12, 2008. On that date, the Government filed the motion in limine that is the subject of this *Opinion*.

II. ANALYSIS

The Archaeological Resources Protection Act ("ARPA) is codified at 16 U.S.C. §§ 470aa *et seq*. Mr. Gallegos is charged with having violated 16 U.S.C. § 470ee(b)(2), which criminalizes the trafficking in archaeological resources and provides that:

> [n]o person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange any archaeological resource if such resource was excavated or removed from public lands or Indian lands in violation of . . . any provision, rule, regulation, ordinance, or permit in effect under any other provision of

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degrees, 26.009 minutes, W107 degrees, 33.745 minutes; and

Count 5 - three (3) Navajo grayware pots, one conical vessel approximately 40.1 cm in height, inventoried by the Bureau of Land Management as Pot 10, one small bowl approximately 10.3 cm in height, inventoried by the Bureau of Land Management as Pot 5, one conical vessel approximately 32.2 cm in height, inventoried by the Bureau of Land Management as Pot 15, all taken from the Canyon Largo area, GPS coordinates N36 degrees, 28.610 minutes, W107 degrees, 32.306 minutes.

Federal law.[3]

16 U.S.C. § 470ee(b)(2). Although subsection (d)[4] sets forth a "knowing" mens rea, the parties dispute whether the Government bears the burden of proving that Mr. Gallegos knew both that (1) he was purchasing an archaeological resource; *and* (2) the archaeological resource had been removed from public lands, or just that he knew he was purchasing an archaeological resource.[5]

In United States v. Quarrell, the Tenth Circuit was asked to decide whether "knowingly" extended to each element of an ARPA offense where the defendants argued that the Government was required to prove that they knew they were excavating from public

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[3] The applicable federal law in this case, as charged in the superseding indictment, is the Antiquities Act of June 8, 1906, 16 U.S.C. § 433.

[4] Subsection (d) provides:

> Any person who knowingly violates, or counsels, procures, solicits, or employs any other person to violate, any prohibition contained in subsection (a), (b), or (c) of this section shall, upon conviction, be fined not more than $10,000 or imprisoned not more than one year, or both: Provided, however, That if the commercial or archaeological value of the archaeological resources involved and the cost of restoration and repair of such resources exceeds the sum of $500, such person shall be fined not more than $20,000 or imprisoned not more than two years, or both. In the case of a second or subsequent such violation upon conviction such person shall be fined not more than $100,000, or imprisoned not more than five years, or both.

16 U.S.C. § 470ee(d).

[5] The superseding indictment, however, charges that the archaeological resources in question are "pots that [Mr.] Gallegos] . . . knew to have been removed from public lands without a permit, and which pot[s] had in fact been removed from public lands without a permit issued under the Antiquities Act of June 8, 1906 (16 U.S.C. § 431-433)." [Doc. 68 at 1-2].

lands. United States v. Quarrell, 310 F.3d 664, 668 (10th Cir. 2002). The defendants in Quarrell had been arrested for vandalizing an archaeological site in the Gila National Forest in southern New Mexico. Having been found with, among other things, pieces of Mimbres pottery, the defendants stipulated that they (1) were familiar with Mimbres archaeology and art; (2) knew they were digging in a prehistoric Mimbres Pueblo; (3) intended to excavate and remove Mimbres artifacts; and (4) had not received or applied for a permit from the Forest Service to excavate the site. The Quarrell defendants were convicted of having violated the ARPA. Id. at 669.

Importantly, however, the Quarrell defendants were charged with having violated subsection (a) of 16 U.S.C. § 470ee.[6] Addressing an issue of first impression, the Tenth Circuit held that the Government need not prove as an element of the offense that a defendant charged with violating subsection (a) knew he was on public lands. Quarrell, 310 F.3d 664, 674. The defendants in Quarrell attempted to rely on Staples v. United States, 511 U.S. 600 (1994) (prosecution for possession of unregistered firearm) and United States v. X-Citement

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[6] Subsection (a) provides that

> [n]o person may excavate, remove, damage, or otherwise alter or deface, or attempt to excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands or Indian lands unless such activity is pursuant to a permit issued under section 470cc of this title, a permit referred to in section 470cc(h)(2) of this title, or the exemption contained in section 470cc(g)(1) of this title.

16 U.S.C. § 470ee(a). As previously explained, Mr. Gallegos is charged with having violated subsection (b)(2).

Video, Inc., 513 U.S. 64 (1994) (prosecution for knowingly transporting, shipping, receiving or distributing visual depiction of minor engaging in sexually explicit conduct) for the proposition that the Government was required to prove that they knew they were excavating on public lands, but the Circuit distinguished both cases, explaining that

> [u]nlike a citizen owning a firearm unaware of its automatic firing capabilities, or a distributor of sexually-explicit materials unaware of the age of its performers, ***a person excavating on someone else's land, whether public or private, cannot reasonably expect to be free from regulation***. In Staples, the Court opined that because of the long tradition of lawful gun ownership, gun owners are not sufficiently on notice of the likelihood of regulation to warrant dispensing with the scienter requirement. . . . Excavating for archaeological resources has not enjoyed a similar tradition.

Id. at 672 (emphasis added). To put it another way, for Staples and X-Citement Video to have dispensed with a mens rea requirement "would [have] criminalize[d] a broad range of apparently innocent conduct." Id. at 671. By contrast, because one generally is not entitled to enter another's land and remove items he finds there, Quarrell held that the fact that an archaeological resource was removed from public lands was "best described as a jurisdictional element[,]" id. at 674, at least where the indictment charges a violation of 16 U.S.C. § 470ee(a), which criminalizes the actual excavation and/or removal. Looking to the Ninth Circuit, Quarrel concluded that what the Government is required to prove with respect to knowledge is that "a person charged under ARPA knew, or at least had reason to know, that the object taken is an 'archeological resource.'" United States v. Lynch, 233 F.3d 1139,

1143 (9th Cir. 2000).[7]

Notwithstanding that Mr. Gallegos, like the Quarrell defendants, has been charged with violations of the ARPA, this Court deems subsections (a) and (b) sufficiently dissimilar to support distinguishing Quarrell under the unique circumstances presented here. Consequently, the Court concludes that, *as a buyer/seller and not the actual remover of the pottery in question*, Mr. Gallegos situation is more akin to the facts of Staples and X-Citement Video, because to eliminate the requirement that the Government prove that he knew or should have known that he was purchasing illegally removed pottery would "criminalize a broad range of apparently innocent conduct," Staples, 511 U.S. at 610, specifically, buying and selling pottery readily available on the open market. Quarrell was "not a situation involving a need to apply a mens era requirement to 'each of the statutory elements that criminalize[d] otherwise innocent conduct[,]'" Quarrell, 310 F.3d at 672 (*quoting* X-Citement Video, 513 U.S. at 72), because, again, there generally is no right to go upon another's land, without permission, and take valuable objects found thereon. By contrast, since "guns generally can be owned in perfect innocence," Staples, 511 U.S. at 610, an element of the offense[8] in Staples was that the defendant have known that the weapon he

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[7] The same problem that confronted the Ninth Circuit in Lynch exists here: a lack of case law or other guiding authority as to the precise issue presented. See Lynch, 233 F.3d at 1140 ("We have examined the limited judicial authority we have found on the criminal liability of one who is charged with a knowing violation of a statute denouncing as a crime the removal of an 'archeological resource. . . .'").

[8] 26 U.S.C. § 5861(d) (making it "unlawful for any person . . . to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record. . . .").

possessed had automatic firing features bringing it within the scope of the National Firearms Act. Similarly, because it is not unlawful to buy and sell sexually explicit materials involving adults, X-Citement Video held that, in order to secure a conviction under the Protection of Children Against Sexual Exploitation Act of 1977, the Government must show that the defendant knew that pornographic videos he sold depicted a minor, since "the age of the performers is the crucial element separating legal innocence from wrongful conduct." X-Citement Video, 513 U.S. at 72.

In other words, absent the defendant's knowledge that the weapon he possessed had automatic firing capabilities (Staples), and absent the defendant's knowledge that the videos he sold depicted a minor engaged in sexually explicit conduct (X-Citement Video), the defendants in those cases would not have been engaged in criminal conduct. By contrast, the defendants in Quarrell knew they were excavating on land that did not belong to them, just as the defendants in United States v. Spier knew that they were stealing when they cut down Christmas trees from a national forest, even though they may not have known they were taking United States property (thus relieving the Government of the burden of proving that the defendants' knowledge of government ownership).[9] United States v. Spier, 564 F.2d 934, 938 (10th Cir. 1977)

The critical point that this Court believes distinguishes Quarrell (which, again,

[9] Similarly, because the defendants in United States v. Feola would have known that knew that assault was wrongful, the Government was not required to prove that they knew they were assaulting undercover federal agents in order to secure a conviction under 18 U.S.C. § 111 (assault upon a federal officer or employee). United States v. Feola, 420 U.S. 671, 685 (1975).

addressed only subsection (a) of the statute) from the instant situation is that Mr. Gallegos, as the individual who bought pottery from the ones who allegedly unlawfully took it many decades before, is at least one degree removed from the original wrongful conduct that, in turn, would place his own conduct in violation of the ARPA. Unlike the defendants in Quarrell, Mr. Gallegos did not commit the independently wrongful act of excavating without a permit. Instead, he committed what this Court believes would be—in the absence of proof that he knew or should have known that the grayware had been unlawfully excavated or removed from public lands—the otherwise legal act of buying pottery. Had Mr. Moore and Mr. Allen lawfully removed the grayware pottery from Canyon Largo, their possession, as well as Mr. Gallegos's subsequent purchase of it, would be rightful, since not every purchase of pottery (even pottery legally defined as an "archaeological resource") amounts to a criminal act. Given that, it makes sense to this Court to require the Government to prove that Mr. Gallegos knew or should have known that the pots he was purchasing were removed from public lands, in violation of the Antiquities Act of June 8, 1906. To read the "knowing" requirement out of the "removed from public lands" element of 16 U.S.C. § 470ee(b) would, in the Court's opinion, criminalize a broad range of apparently innocent conduct. See Staples, 511 U.S. at 610.[10]

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[10] The Court returns to a question it posed both at the May 28, 2008 Call of the Calendar/Motion in Limine hearing, and the hearing it held on April 23, 2008 for the purpose of considering Mr. Gallegos's motions to dismiss the indictment, which is what effect, if any, does the passage of time have on the Government's burden of proof? As much as half a century may have passed between the actual removal of the Navajo grayware charged in this case and Mr. Gallegos's purchase. While the Government bears the burden of proving in prosecutions brought pursuant to 16 U.S.C. § 470ee(b) that the defendant knew or should have known that the

In light of the Court's conclusion that the Government must prove that Mr. Gallegos knew or should have known that the pottery in question had been removed from public lands in violation of the Antiquities Act of June 8, 1906, the Court also concludes that Mr. Gallegos should be allowed to present as a defense that he reasonably and honestly believed the pottery to have been lawfully removed from Canyon Largo, since "such 'an honest mistake of fact would not be consistent with criminal intent.'" Quarrell, 310 F.3d at 675 (*quoting* Feola, 420 U.S. at 686)). Accordingly, the Government's motion in limine seeking to preclude such a defense will be denied. As always, this pretrial evidentiary ruling is subject to reconsideration in the event that unforeseen circumstances or a change in context should arise during the trial.

III. CONCLUSION

For the foregoing reasons, *The United States' Motion in Limine Asking That Defendant, Robert Gallegos, Not Be Allowed To Present Evidence, or Argue As A Defense, That He Did Not Know The Navajo Grayware Pots He Purchased Came From Public Land* is denied.

IT IS, THEREFORE, ORDERED that *The United States' Motion in Limine Asking That Defendant, Robert Gallegos, Not Be Allowed To Present Evidence, or Argue As A Defense, That He Did Not Know The Navajo Grayware Pots He Purchased Came From Public Land* [Doc. 105] is **DENIED.**

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archaeological resource at issue was removed from public lands, whether removed 1 week or 50 years prior to its later purchase or exchange, a defendant's *ability even to know* from where the resource came takes on even greater import with the passage of time.

SO ORDERED this 30th day of May, 2008, in Albuquerque, New Mexico.

M. CHRISTINA ARMIJO
United States District Judge