

**NEW WEAPONS AND NEW TARGETS:
CRIMINAL SANCTIONS AND REDRESS AGAINST
MUSEUM WORKERS UNDER US LAW**

On 4th January 2008, US federal agents raided four museums and one gallery in California – including the Los Angeles County Museum of Art, the Pacific Asia Museum, the Charles W. Bowers Museum and the Mingei International Museum – in what is considered the first major US Government crackdown on a group of museums for allegedly dealing in looted artefacts.¹ This sting operation was the culmination of a five-year investigation into the smuggling of looted antiquities from Thailand, Myanmar, China and Native American sites.² In two of the search warrants issued in that connection, the Government alleged that the Bowers and Pacific Asia museums possessed stolen antiquities from Thailand in violation of, among other things, the National Stolen Property Act (the ‘NSPA’). But, in addition to these allegations against the museums, the Government went further and specifically alleged that individual museum officials had violated the NSPA as well. The warrants stated that “the museums’ personnel knew, or were in positions to suspect” that the museums were in possession of illegally exported Thai antiquities.³ According to the warrants, the Thai Government had asserted ownership of the antiquities prior to their recent export from Thailand.⁴ Thus, the museums’ personnel could be prosecuted pursuant to the NSPA.

To date, the United States has not pursued criminal proceedings against any of the museum officials. In 2010, however, gallery owners and art dealers Jonathan and Carolyn Markell were indicted for their actions taken in connection with the allegedly looted artefacts. According to the indictment, Jonathan and Carolyn Markell engaged in a conspiracy, pursuant to which they would purchase antiquities that they knew to be looted, then obtain falsely inflated appraisals for the objects and donate the antiquities to a museum in order to receive a charitable tax deduction.⁵ The appraiser, Roxanna Brown, was also indicted for her role in the scheme, with federal grand jury proceedings brought only months after the raids. Brown died, however, almost immediately after the proceedings,

1 Andrew Murr, ‘Murky Provenance’, *Newsweek*, 25 Jan. 2008.

2 Edward Wyatt, ‘Four California Museums are Raided’, *N.Y. Times*, 25 Jan. 2008.

3 Stephen K. Urice, ‘Between Rock and Hard Places: Unprovenanced Antiquities and the National Stolen Property Act’, 40 N.M. L. Rev. 123m 149 (2010) [hereinafter ‘Urice’].

4 *Ibid.*

5 Indictment, *United States v. Markell*, No. 2:10-cr-00925 (C.D. Cal. 17 Aug. 2010).

and the charges against her were dropped.⁶ What is notable about Brown's indictment is that, in addition to her role as an appraiser and "recognized expert on Asian antiquities", Brown was also the curator of a museum in Thailand, the Southeast Asian Ceramics Museum at Bangkok University.⁷ Although her role as curator had no direct relation to the case – the museum was not involved in the scheme – her position as curator underscores the fact that a museum official could be indicted for his or her role in an illicit art market scheme.

Indeed, the fact that the search warrants included allegations against museum officials is quite notable. It appears to be well established that art theft has become a multibillion dollar illegal enterprise, second only to drugs and arms smuggling.⁸ In the international market, trade of illicitly obtained antiquities alone can generate as much as \$25 million annually, and one of the largest consumers of such looted property is the United States.⁹ Yet, while a portion of these stolen objects inevitably end up in the possession of museums, most cases involving museums are resolved either by civil litigation or by diplomatic means – and not by criminally prosecuting museum workers for their roles in knowingly arranging for the museums to acquire or maintain possession of stolen objects. The fact that museum officials were implicated in this instance suggests that the US Government may be moving in this direction, utilising criminal prosecution as a means of fighting the illicit art market trade. It is therefore important to understand how existing laws in the United States may be applied to hold museum officials criminally liable. To that end, this paper will focus on the National Stolen Property Act and the various forfeiture proceedings that may be brought in connection with that law.

I. THE NATIONAL STOLEN PROPERTY ACT

A. The Knowledge Requirement

Pursuant to the NSPA, the United States may criminally prosecute those who possess, sell, receive or transport stolen goods valued at more than \$5,000 that have either crossed a state or United States boundary line or moved in interstate or foreign commerce, and may render such objects open to forfeiture proceedings. Violations of the NSPA are punishable by fine and/or imprisonment for up to ten years. 18 U.S.C.A. §§2314–2315.

6 Press Release, Thom Mrozek, Public Affairs Officer of the United States Attorney's Office, 'Asian Antiquities Expert Indicted for Wire Fraud' (12 May 2008). On 14 May 2008, the press release was updated to include a note describing Roxanna Brown's death.

7 *Ibid.*

8 Bonnie Czeglédi, 'Crimes Against Culture Merit Serious Consequences', 15 *Can. Crim. L. Rev.* 111,112 (2010).

9 Gabrielle Paschall, 'Protecting Our Past: The Need for Uniform Regulation to Protect Archaeological Resources', 27 *T.M. Cooley L. Rev.* 353, 357 (2010).

A fundamental principle in criminal law is that, for almost every case, a person must have the requisite *mens rea*, or ‘guilty mind’, in order to be convicted of a crime.¹⁰ The NSPA is no exception. In order to establish a violation of the NSPA, the US Government must prove beyond a reasonable doubt that the defendant knew that he or she was dealing with unlawfully stolen or converted objects. Indeed, this is the “*only* knowledge requirement in the NSPA.”¹¹ The defendant need not know that the property moved in interstate or international commerce.¹² But, while seemingly simple, this premise raises a number of questions. First, in what ways may the Government prove that an individual has such knowledge? Next, may a museum worker who suspects, but is not certain, that an object constitutes stolen property be open to criminal liability? And finally, what happens when a museum official *later* discovers that the museum is in possession of stolen property? Each of these questions is addressed in turn.

First, pursuant to the NSPA, knowledge may be imputed based on the facts and circumstances of the case. For example, in the case of *United States v. Hollinshead*¹³ the defendant, a dealer in pre-Columbian artefacts, claimed that he had no knowledge of Guatemalan patrimony laws, which established that Guatemala owned the stolen object in question. The defendant, however, was shown to have: i) bribed Guatemalan officials to export the artefacts to a fish packing plant in Belize; ii) financed and arranged for the artefacts to be packed in his presence and marked ‘personal effects’; and iii) shipped the artefacts to his address in California. The Ninth Circuit upheld the defendant’s conviction, noting that “[i]t would have been astonishing if the jury had found that [the defendant] did not know that the stele was stolen.”¹⁴ Similarly, in *United States v. Aleskerova*¹⁵ the Second Circuit upheld the conviction of Natavan Aleskerova for possession and conspiracy to possess and sell stolen art in violation of the NSPA. The defendant’s clandestine activities, including covert meetings and conversations, established the requisite knowledge that the artworks were stolen.

Thus, where a stolen object is imported into the United States from a foreign country, as is often the case with looted antiquities, a defendant’s lack of knowledge of that country’s laws will not prevent a finding that the party knew the property was stolen. While a defendant may “argue that he did not know a certain *fact* that made his conduct criminal” – i.e. that he or she did not know that “the objects

10 Cynthia H. Finn, ‘The Responsible Corporate Officer, Criminal Liability, And Mens Rea: Limitations on The Rco Doctrine’, 46 *Am. U.L. Rev.* 543, 547-548 (1996).

11 *United States v. Schultz*, 333 F.3d 393, 411 (2d Cir. 2003) (internal quotations removed).

12 L. Sand, *et. al.*, ‘Modern Federal Jury Instructions, Criminal Pattern Instructions’, ¶ 5-125 (Matthew Bender ed., 2010).

13 495 F.2d 1154, 1156 (9th Cir. 1974).

14 *Ibid.* at 1155.

15 300 F.3d 286 (2d Cir. 2002).

in question were stolen” – where a jury determines that the defendant knew “all of the relevant facts”, it is no defence for the defendant to argue ignorance of a particular country’s laws.¹⁶ Stated simply, the Government is not required “to prove that the [defendant] knew *where* [the object] was stolen.”¹⁷ Accordingly, where the Government is able to prove that a museum official knew (even by circumstantial evidence) that the property he or she acquired was stolen, that individual may be charged with a violation of the NSPA; the museum worker’s knowledge as to laws of the object’s country of origin will not be determinative.

Even so, this still leaves the question of whether a museum official must be certain that an object constitutes stolen property to have the requisite knowledge. Historically, museum officials have been reluctant to ask probing questions with regard to an object’s provenance, or ownership history, when acquiring a work of art.¹⁸ Under the NSPA, however, where a defendant “deliberately closed his eyes to what would otherwise have been obvious to him”, a jury may still find that the defendant knew an object constituted stolen property.¹⁹ For example, in *United States v. Schultz*, in which Frederick Schultz was convicted and sentenced to 33 months in prison for conspiracy to receive stolen objects that had been illegally smuggled out of Egypt and imported into the United States, the district court provided the following instructions to the jury:

[A] defendant may not purposefully remain ignorant of either the facts or the law in order to escape the consequences of the law. Therefore, if you find that the defendant, not by mere negligence or imprudence but as a matter of choice, consciously avoided learning what Egyptian law provided as to the ownership of Egyptian antiquities, you may [infer], if you wish, that he did so because he implicitly knew that there was a high probability that the law of Egypt invested ownership of these antiquities in the Egyptian government. You may treat such deliberate avoidance of positive knowledge as the equivalent of such knowledge, unless you find that the defendant actually believed that the antiquities were not the property of the Egyptian government.²⁰

On appeal, the Second Circuit affirmed the conviction, and held that, with regard to the doctrine of conscious avoidance, as set forth by the district court to the jury, the court had “adequately stated the law.”²¹ In the words of Martha B.G. Lufkin, legal correspondent for *The Art Newspaper*:

16 *Schultz*, 178 F. Supp. 2d 445 (S.D.N.Y. 2002), *aff’d* 333 F.3d 393, at 411 (2d Cir. 2003).

17 *Hollinshead* above, note 13, at 1156, (emphasis added)..

18 See, e.g., Thomas Hoving, *Making the Mummies Dance: Inside the Metropolitan Museum of Art* 217 (1993) (referring to that period as the ‘age of piracy’).

19 L. Sand, *et. al.*, above, note 12.

20 *Schultz*, 333 F.3d 413.

21 *Ibid.*

a curator who remains ‘purposefully ignorant’ of the facts and ‘consciously avoid[s] learning’ them may be inferred to have ‘implicitly know[n] that there is a high probability’ that the facts are bad. A jury may treat ‘such deliberate avoidance of positive knowledge’ as actually knowing the bad facts.²²

The third question left to be answered is whether, where a museum official is initially unaware, but later learns that the museum at which he or she is employed is in possession of stolen property, that official may be criminally liable for the museum’s possession of such property. For purposes of the NSPA, ‘possession’ refers not just to the initial receipt of an object, but to the continued possession of the object as well.²³ In *United States v. Trupin*, for example, the court affirmed the defendant’s conviction for possession of a stolen Chagall painting, although he had purchased it some years earlier. The court explained that the relevant conduct for the purposes of his conviction “was not the receipt of the painting ... but the continued possession” of it.²⁴ Interestingly, the fact that the painting was moved in 1980 – six years before Congress amended the NSPA to include ‘possession’ as a punishable offence – did not violate the *ex post facto* clause. In the words of the court, Trupin “could have avoided conviction for possession by ceasing his possession within a reasonable time after the 1986 amendment”, for instance by “return[ing] the painting to its owners anonymously or through his attorney, or deliver[ing] it to a legitimate custodian of lost and stolen art.”²⁵ The court concluded that his “failure to take any such remedial steps after the change in the federal law subject[ed] him to conviction without implicating the *ex post facto* clause.”²⁶

The *Trupin* decision suggests that museum officials may be found guilty of violating the NSPA where they become aware that the museum is in possession of a stolen art object, even though it may have been acquired many years earlier. Archaeologist and associate professor at the University of Miami School of Law Stephen K. Urice has likewise concluded that a failure on the part of museums to “divest themselves of [unprovenanced objects] promptly” would “expose the antiquities to civil seizure and forfeiture proceedings, and the museums’ board and staff members to criminal liability.”²⁷

22 Martha B.G. Lufkin, ‘End of Era of Denial for Buyers of State-Owned Antiquities: *United States v. Shultz*’, 11 *Int’l J. Cult. Prop.* 305, 316 (2002).

23 *United States v. Trupin*, 117 F.3d 678 (2d Cir. 1997).

24 *Ibid.* at 686.

25 *Ibid.* at 686-687.

26 *Ibid.*

27 Urice at 158-159.

B. Defining ‘Stolen’ Property

Another important aspect of the NSPA is understanding the ways in which an object may be considered ‘stolen’ for the purposes of the NSPA. While the NSPA does not expressly define ‘stolen’, the Supreme Court has broadly construed the term, explaining that ‘stolen’ includes “all felonious takings. . . with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny.”²⁸ The trial court in *United States v. Hollinshead* further defined the term, instructing the jury that “[s]tolen” means acquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession given and with the intent to deprive the owner of the benefit of ownership.”²⁹ On appeal, the Ninth Circuit upheld the court’s instructions to the jury, thereby affirming that court’s definition of the term.

In two subsequent related decisions involving the trafficking of pre-Columbian artefacts into the United States from Mexico, the Fifth Circuit addressed the novel issue of whether “a declaration [of national ownership] combined with a restriction on exportation without consent of the owner (Mexico) is sufficient to bring the NSPA into play.”³⁰ Relying on the fact that prior case law had expansively defined the term ‘stolen’, the Fifth Circuit held that an “illegal exportation of an article can be considered theft, and the exported article considered ‘stolen’” where the foreign nation makes a “declaration of national ownership.”³¹ In other words, the NSPA would “protect[] ownership derived from foreign legislative pronouncements, even though the owned objects [may] have never been reduced to possession by the foreign government.”³²

In *United States v. Schultz*, the court affirmed that the NSPA, in conjunction with foreign nations’ cultural patrimony laws, allows federal agents to prosecute individuals for importing illegally excavated objects into the United States. In that case, the court held that Egypt not only had a valid patrimony law in place, but that Egypt had also demonstrated a clear declaration of ownership of all antiquities

28 *United States v. Turley*, 352 U.S. 407, 417 (1957). *Turley* involved the National Motor Vehicle Theft Act, 18 U.S.C.S. § 2312. The definition in *Turley* is relevant to the NSPA because the NSPA was passed into law as an extension of the National Vehicle Theft Act and both statutes appear in the same chapter of the United States Code. See Jennifer Anglim Kreder, ‘The Choice Between Civil and Criminal Remedies in Stolen Art Litigation’, 38 *Vand. J. Transat’l L.* 1199, 1206 (2005).

29 *Hollinshead*, 495 F.2d 1154, 1156 (9th Cir. 1974).

30 *United States v. McClain (McClain I)*, 545 F.2d 988, 1001 (5th Cir. 1977), reh’g denied, 551 F.2d 52 (5th Cir. 1977).

31 *McClain I*, 545 F.2d at 1000-1001.

32 *United States v. McClain (McClain II)*, 593 F.2d 658, 664 (5th Cir. 1979), cert. denied, 444 U.S. 918 (1979).

found in Egypt.³³ The objects in that case were therefore considered stolen. Likewise, where a museum official either knowingly acquires, or subsequently learns that a museum is in possession of antiquities that were illegally excavated from a foreign nation with a valid patrimony law in place, that official may be prosecuted for the receipt or possession of that property.

In the context of acquiring Nazi-looted art, courts have similarly construed the term ‘stolen’. In *United States v. Portrait of Wally*,³⁴ the court acknowledged that the term ‘stolen’ “should be broadly construed.”³⁵ The court explained: “determination of whether property is ‘stolen’ in the NSPA context depends on ‘whether there has been some sort of interference with a property interest.’”³⁶ Based on this definition, the court in *Wally* concluded that it was ‘undisputed’ that the painting at issue had been stolen, and that ‘no reasonable juror’ could find otherwise.³⁷

But this finding did not end the court’s inquiry. Under the ‘recovery doctrine’, an object that has been stolen may lose its status as stolen property for purposes of the NSPA if, “before the stolen goods reach[] the receiver, the goods [are] recovered by their owner or his agent, including the police.”³⁸ In this case, the painting *Portrait of Wally* (‘*Wally*’) had originally been owned by Lea Bondi Jaray, a Jewish art dealer in Vienna. In 1939, Ms Bondi Jaray’s gallery was ‘Aryanised’ by a Nazi agent, who also forced Ms Bondi Jaray to give up *Wally*, which was part of her personal collection. After the War, *Wally* was recovered by US Forces and returned to Austria. But *Wally* was mistakenly mixed in with the artworks of another Jewish art collector, Heinrich Rieger, and became part of the Austrian National Gallery (the Belvedere) along with other Rieger works. The painting was later purchased by Rudolf Leopold from the Belvedere, and eventually became part of the Leopold Museum (the ‘Museum’). According to the Museum, *Wally* was no longer stolen property by the time it was shipped into the United States by the Leopold Museum. The Museum argued that *Wally* had lost its status as stolen property upon its recovery by the US Forces after the War. Alternatively, the Museum argued that even if *Wally* was still stolen when recovered by the US Forces, the painting would have lost its stolen status when returned to the Austrian Federal Office for the Preservation of Historical Monuments, or the Bundesdenkmalamt (‘BDA’).

33 *Schultz*, 178 F. Supp. 2d 445 (S.D.N.Y. 2002), aff’d 333 F.3d 393 (2d Cir. 2003).

34 Herrick, Feinstein LLP represented the Estate of Lea Bondi Jaray throughout the *United States v. Portrait of Wally* litigation.

35 *United States v. Portrait of Wally*, 663 F. Supp. 2d 232, 252 (S.D.N.Y. 2009).

36 *Ibid.* at 252 (quoting *United States v. Benson*, 548 F.2d 42 (2d Cir. 1977)).

37 *Ibid.* at 253.

38 *Ibid.* at 259 (internal quotations removed).

The court rejected both of the Museum's arguments. First, the court noted that the US Forces after the War recovered and seized *all* property of suspected war criminals, "regardless of whether [the property] was stolen, Aryanized, or legitimately acquired."³⁹ Thus, the US Forces would have had no way of knowing whether the painting had been stolen property at the time of its seizure. In addition, the US Forces had "no legal duty to return seized property to its true owner."⁴⁰ Instead, they were merely required to sort the seized property and transfer it to the BDA. Consequently, the US Forces lacked the requisite agency relationship with *Wally*'s true owner for the recovery doctrine to apply. The court found that the same logic also precluded an 'implied agency' between Ms Bondi Jaray and the BDA. As with the US Forces, the BDA did not know that *Wally* was stolen while it was in its possession. Moreover, the BDA had 'divided loyalt[ies]' – the BDA often sought to keep artworks in Austria so that they could be placed in Austrian museums. The court thereby determined that *Wally* had retained its status as stolen property. This decision suggests that museum officials who knowingly acquire art that was looted by the Nazis, but subsequently recovered by US Forces, may not be protected from prosecution pursuant to the NSPA, as such property would be likely to retain its status as stolen.

II. FORFEITURE ACTIONS

A. Criminal Forfeiture

Generally, property is subject to forfeiture if it falls under one of the following three categories: i) contraband; ii) instrumentalities of a criminal offence; or iii) property constituting, derived from, or traceable to any proceeds obtained from criminal activity.⁴¹ The Government may bring a forfeiture action in either the criminal or the civil context. In the criminal context, where a party is found guilty of having violated the NSPA, that property may be subject to forfeiture as part of the sentencing phase of the case.⁴² Criminal forfeiture actions are *in personam*, meaning that the action is "directed at the defendant personally."⁴³

This raises interesting issues when applied to museum workers. In contrast to art dealers or art collectors who have been convicted of NSPA violations, museum employees convicted of, for example, acquiring stolen objects on behalf of the museum, would not own the art objects at issue. But because "only the defendant ha[s] the right to contest the evidence the government introduced in that person's

39 *Ibid.* at 260 (internal quotations removed).

40 *Ibid.* at 260.

41 See 18 USC § 981(a)(1).

42 Stefan D. Cassella, 'Overview of Asset Forfeiture Law in the United States', 17.3 *S. Afr. J. Crim. Just.*, 347, 365 (2004) [hereinafter 'Cassella'].

43 *Ibid.* at 355.

criminal trial to establish the underlying crime”, only property that is owned by the defendant may be forfeited.⁴⁴ Moreover, where forfeiture is sought in a criminal case, the Government must ‘have reason to believe’ that it will be able to establish that the defendant is at least a partial owner of the property.⁴⁵ As a result, where stolen property that is subject to forfeiture is wholly owned by a party other than the defendant, the Government may not proceed against that property. And in the event that the Government erroneously forfeits property that is owned by a third party, that party has the right to demonstrate its superior ownership interest, and to void the forfeiture in a post-trial ancillary proceeding.⁴⁶

B. CAFRA Forfeiture

Civil forfeiture, on the other hand, allows the Government to proceed against property even when it did not belong to the defendant at the time the crime was committed. In general, federal civil forfeiture actions in the United States are governed by the Civil Asset Forfeiture Reform Act (‘CAFRA’). CAFRA applies to all civil forfeitures initiated under any provision of federal law – including the NSPA – with the exception of a few federal laws explicitly exempted, including what are known as ‘customs laws’, which are addressed in further detail below.⁴⁷

Unlike criminal actions, jurisdiction in civil forfeiture actions is based on *in rem* jurisdiction over the property. Thus, the United States need not convict the owner of the property, or any other party, of a crime in order to subject the property to forfeiture.⁴⁸ This means that where a museum employee acts in violation of the NSPA, the Government may bring a civil forfeiture action for the stolen property, even though the museum official does not own the objects.

Suppose, for instance, a museum official hires a pilot to fly stolen antiquities from Mexico to California.⁴⁹ En route, the pilot is caught and the airplane seized. In a civil forfeiture case against the airplane or the objects, it would not matter whether they belonged “to the [museum official], the pilot, a South American corporation, or anyone else.”⁵⁰ Furthermore, it would be of no consequence as to whether

44 *Ibid.*

45 Stefan D. Cassella, ‘Third Party Rights in Criminal Forfeiture Cases’, 32.6 *Crim. L. Bulletin* 499, 500 (1996).

46 Cassella at 355.

47 CAFRA does not apply to civil forfeiture actions brought under Title 19 or to civil forfeitures brought under § 22 U.S.C. 401. Section 983(i) of Title 18 provides a list of all civil forfeiture provisions exempt from CAFRA.

48 Cassella at 361.

49 The example provided here is an adaptation of a similar hypothetical provided in Stefan D. Cassella’s article, ‘Third Party Rights in Criminal Forfeiture Cases’, 32.6 *Crim. L. Bulletin* 499 (1996).

50 *Ibid.*

the museum official were charged and prosecuted for the criminal offence. The Government need only initiate the civil forfeiture action, and “anyone claiming an interest and wishing to contest the forfeiture” may file a claim.⁵¹

Pursuant to 18 U.S.C. § 983(d), an ‘innocent owner’ defence may defeat a civil forfeiture action under CAFRA. The party asserting the defence carries the burden of proof and must establish the defence by a preponderance of the evidence.⁵² As defined in the statute, an ‘innocent owner’ with a property interest “in existence at the time [of] the illegal conduct” is one who either i) “did not know of the conduct giving rise to [the] forfeiture”; or ii) “upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property.”⁵³ Where the property interest is acquired *after* the conduct giving rise to the forfeiture has taken place, an ‘innocent owner’ is one who, “at the time that [the] person acquired the interest in the property”, was “a bona fide purchaser or seller for value” who either did not know, or had no reason to believe, that the property being acquired was subject to forfeiture.⁵⁴ In the context of a museum employee acting on behalf of the museum, it is therefore unlikely that the innocent owner defence would be applicable, since the official would probably not have acquired an ownership interest in such property.

C. Non-CAFRA Forfeiture

Cases that are initiated for the forfeiture of stolen art objects are often brought pursuant to 19 U.S.C. § 1595a, a customs statute that authorises the forfeiture of any merchandise that is “stolen, smuggled, or clandestinely imported or introduced” or attempted to be introduced into the United States “contrary to law”.⁵⁵ A violation of the NSPA typically serves as the basis for satisfying the statute’s requirement that the Government demonstrate that the object was introduced into the United States “contrary to law”.

As previously noted, CAFRA does not apply to civil forfeiture actions brought under Title 19 of the United States Code. As a result, different procedural provisions apply. For example, in contrast to CAFRA actions, under § 1595a the Government bears a vastly reduced initial burden of proof, i.e., that there is probable cause to believe that the object at issue is subject to forfeiture. Moreover, the Government may rely on hearsay evidence to establish such probable cause.⁵⁶

51 *Ibid.*

52 18 U.S.C. § 983(d)(1).

53 18 U.S.C. § 983(d)(2)(A).

54 18 U.S.C. § 983(d)(3)(A).

55 19 U.S.C. § 1595a(c)(1); see, e.g., *United States v. Davis*, 2011 U.S. App. LEXIS 11356 (Feb. 2, 2011); *United States v. An Antique Platter of Gold*, 184 F. 3d 131 (2d Cir. 1999); *Wally*, 663 F. Supp. 2d at 251.

56 See, e.g., *United States v. One Lucite Ball Containing Lunar Material*, 252 F. Supp. 2d

Once the Government meets this initial burden, the burden shifts to the possessor of the property to establish by a preponderance of the evidence that the object was not stolen merchandise introduced into the United States contrary to law.⁵⁷

For example, in *United States v. Davis*,⁵⁸ the Government initiated a forfeiture action for a work of art that had been stolen from the Musée Faure in France and subsequently brought into the United States by the thief. The Government presented eyewitness testimony identifying the thief and established that he had sold the artwork to an individual in Texas. On this basis, the court determined that the Government made a successful showing of probable cause as required under the statute. The burden thereupon shifted to the possessor of the artwork to establish that it was not stolen merchandise brought into the United States contrary to law.

In this instance, the possessor, Sharyl R. Davis, acquired possession of the painting after the Sharan Corporation – an entity that had been partially owned by Davis but which was defunct by 1992 – had purchased the painting from J. Adelman Antiques and Art Gallery in 1985. The gallery, in turn, had acquired the artwork in 1981, after the thief consigned the picture to the gallery. At trial, a jury determined that Davis was unable to meet her burden of proving that the artwork was not stolen, and she was ordered to forfeit the picture. In relevant part, the jury determined that Davis had *not* been able to prove: i) that the painting was a different artwork from the one that had been stolen from the Musée Faure; ii) that the thief had not transmitted or transferred the painting in interstate or foreign commerce; or iii) that the thief, knowing it was stolen, did not “receive possess, conceal, store, barter, sell or dispose of” the painting after it crossed a US or state border.

In the appeal that followed, Davis argued, among other things, that she was entitled to rely on the innocent owner defence. But, as was affirmed by the *Davis* court, a significant difference between § 1595a forfeiture actions and those brought pursuant to CAFRA is the unavailability of this defence. As defined in CAFRA, ‘civil forfeiture statutes’ do not include any provisions that were enacted as part of the Tariff Act of 1930. This exclusion, commonly known as the ‘customs carve-out’, applies to § 1595a. Accordingly, the innocent owner defence, which is available only in CAFRA forfeiture actions, does not apply in forfeiture claims brought pursuant to § 1595a.⁵⁹ Thus, even though Davis had not been personally involved, or possibly even aware that the painting constituted stolen property, the artwork could be forfeited nonetheless.

1367, 1373 (S.D. Fla. 2003); *Nnadi v. Richter*, 976 F.2d 682, 686 (11th Cir. 1992).

57 See *Davis*, 2011 U.S. App. LEXIS 11356, at *7.

58 *Ibid.*

59 See *Davis*, 2011 U.S. App. LEXIS 11356, at *22-*28.

But what does this mean for museums and their employees? If a museum acquires or is in possession of stolen property, the Government is free to initiate a forfeiture proceeding, and such property may be turned over to the Government regardless of whether the employee who had acquired the work on behalf of the museum was aware of that artwork's tainted provenance. Even so, such forfeiture does not expose museum workers to criminal liability in this context.

III. CONCLUSION

The United States has yet to prosecute a museum worker for his or her violation of the NSPA. Even so, recent case law, as well as the 2008 raids and subsequent charges, suggest that this may not be the case for much longer. And while civil suits and diplomatic measures are one helpful way to combat the growing trade in illicitly obtained art objects, criminal prosecution of museum workers would send a clear message to the art community, and provide a useful tool for the United States to curb illicit trade in such art objects. It may also cause a 'chilling effect' that could result in museum workers being more vigilant so as to avoid being implicated in improper dealing by their museums.