CASE NOTE
End of the Era of Denial for Buyers of State-Owned Antiquities: *United States v. Schultz*

MARTHA B. G. LUFKIN*

In a decision rendered even more forceful by its brevity, the Federal District Court for the Southern District of New York has again said that a foreign law declaring state ownership of antiquities can make an object "stolen" for purposes of U.S. law—even if the object was not "stolen" in the traditional sense.[1] The case is a first for New York in basing a criminal conviction on a foreign "patrimony" law claiming state ownership of antiquities, following *United States v. McClain*.[2] But it is another opportunity for Manhattan's lower federal court, following on the heels of its recent rulings in two other art law cases, *United States v. An Antique Platter of Gold* and *United States v. Portrait of Wally*, to again tell the unbelieving that *McClain* is good law in New York.[3]

The *Schultz* decision, now on appeal, hands back to the U.S. Court of Appeals for the Second Circuit a question it recently avoided: whether it is right or wrong to base a violation of the U.S. National Stolen Property Act (NSPA) on a foreign law declaring state ownership of antiquities.[4] Critics of *McClain* have argued that such "patrimony" laws should not be "enforced" in the United States,[5] but the *Schultz* court looked unblinkingly to Egyptian law to find that the Egyptian government owned the antiquities Schultz sold. It then held that the NSPA applies to foreign thefts. The court then swept away Schultz's argument that the Convention on Cultural Property Implementation Act (CCPIA), which restricts imports of certain antiquities,[6] precludes NSPA-based prosecutions of stolen, state-owned antiquities. More than one law can cover stolen imported antiquities, the court said, citing a Second Circuit decision, *United States v. Stephenson*.[7]

As the antiquities trade faces increased scrutiny, and foreign nations such as Italy, Egypt and Turkey seek to uphold their patrimony laws by legal actions in the U.S., the *Schultz* decision and its immediate consequence—the criminal conviction of a prominent New York art dealer for selling stolen Egyptian antiquities—

*Attorney at law, Lincoln, Massachusetts; legal correspondent, *Art Newspaper*.

International Journal of Cultural Property, Vol 11, No. 2, 2002, pp. 305–322

mean that changing legal realities may no longer be denied by buyers of state-claimed antiquities.[8] Collectors, dealers and museums may no longer be able to accept antiquities as arguably "not stolen" under U.S. law if they come from countries with patrimony laws unless the objects have clear written provenance.[9] After *Schultz* there is no quarter for the "not stolen" argument in the Southern District of New York.

1 THE INDICTMENT

The indictment charged that Schultz conspired to violate the NSPA by knowingly receiving, possessing, and selling goods worth $5,000 or more that had crossed a U.S. boundary "after being stolen," specifically, "Egyptian antiquities" unlawfully removed from Egypt after 1983.[10]

The indictment cited Egyptian Law 117, enacted in 1983, relating to the protection, registration, preservation, and discovery of Egyptian antiquities.[11] According to the indictment, Law 117 declared all newly discovered antiquities to be public property. After its passage, the indictment stated, the possession, ownership, transfer or trade of antiquities was illegal. Although antiquities could be kept if acquired before 1983, owners had to notify the antiquities authorities of such items and not remove them from Egypt. "Antiquity" was defined to include any movable object having "archaeological or historical value or significance" as a relic of a civilization historically in Egypt. The law placed no restrictions on antiquities removed from Egypt before 1983. Egypt maintained records of known antiquities but had no record of antiquities found in the ground and not reported to the government.[12]

The indictment alleged the following facts. Frederick Schultz, head of a New York gallery that sold Egyptian and other antiquities, had been past president of the National Association of Dealers in Ancient, Oriental and Primitive Art, a prominent association of dealers in ancient art based in New York.[13] He began obtaining antiquities from an unindicted coconspirator, Jonathan Tokeley-Parry, who removed the objects from Egypt, including objects recently found in the ground by farmers and builders.[14] Egyptologists examined the objects for Schultz to determine whether the objects came from a tomb for which there was a documentary record. Among other communications to Schultz, Tokeley-Parry faxed a letter saying that the "boys have just returned from the hills above Minea, which is bandit country . . . and we are offered a large hoard."[15]

To make it seem that the objects left Egypt before Law 117 was enacted, Schultz falsely told buyers that the objects were from the fictitious "Thomas Alcock" collection, which he said belonged to an English family since the 1920s. Tokeley-Parry supplied "Thom. Alcock" labels.[16]

According to the indictment, among the objects was a stone head of the pharaoh Amenhotep III, which Schultz sought to sell to two museums as "the

finest ancient Egyptian head on the market" at a price of $2.5 million. He ultimately sold it to a London buyer for $1.2 million. Schultz also bought two Old Kingdom painted reliefs taken from a tomb apparently unknown to the Egyptian government, a Sixth Dynasty limestone striding figure, and a faience figure.[17]

2 MOTION TO DISMISS THE INDICTMENT

Schultz sought to dismiss the indictment for failure to state a conspiracy claim under the NSPA. Therefore, all alleged facts were taken as true for purposes of the decision.[18]

2.1 THE *McCLAIN* ATTACK

Schultz argued that an NSPA prosecution cannot be based on a foreign law which merely declares ownership of antiquities, when U.S. citizens would not think of such objects as "stolen."[19] Like art dealer groups, which filed a friend-of-the-court brief in the case, Schultz grounded his attack in *McClain*.[20]

2.1.1 The McClain *Decision*

In *United States v. McClain*, the U.S. Court of Appeals for the Fifth Circuit upheld a dealer's conviction under the NSPA for bringing Pre-Columbian antiquities into the U.S. The court's theory was that the objects belonged to Mexico under Mexican law and were therefore "stolen" property illegally imported in violation of the NSPA.[21] The *McClain* court said that a foreign government's law would have to declare ownership of antiquities, not just bar their export, before an illegal export could be considered theft and, critically, that any such declaration would have to be stated "with sufficient clarity to survive translation into terms understandable and binding upon American citizens."[22] The *McClain* court found that Mexican law's statement of ownership was sufficiently clear to support an NSPA prosecution based on it.

2.1.2 The Comity Argument against McClain

Schultz argued that *McClain* violated rules of comity, because it recognized foreign patrimony laws. Such "artificial" laws clash with how the U.S. treats its own cultural and private property and are "antithetical to the ways Americans think about ownership."[23] Instead, Schultz argued, such foreign laws "are *not* automatically enforceable in this country" and can be applied only where consistent with U.S. law and policy.[24] In the U.S., discovered objects of archaeological interest belong to the property owner, and any government claim would violate the Takings Clause of the Fifth Amendment to the U.S. Constitution.[25] Instead, Schultz claimed that U.S. laws protect only cultural archaeological and Native American objects found on land controlled by the federal government or Indian tribes.[26]

2.1.3 The "Foreign Law Does Not Apply" Argument against McClain

Schultz argued that the application of the NSPA cannot depend on foreign laws and that the NSPA "does not once make reference to foreign laws."[27]

Contrary to Schultz's argument, however, to operate at all, the NSPA must necessarily intend reference to foreign law. Section 2314 of the NSPA makes it a crime for a person to transport in "foreign commerce" any goods worth $5,000 or more "knowing the same to have been stolen."[28] Under section 2315, "[W]hoever receives . . . any goods . . . which have crossed a State or United States boundary after being stolen . . . knowing the same to have been stolen . . . [is guilty of a crime]."[29]

The sections apply to stolen goods moving either out of, or into, the U.S. after being "stolen." The prohibited actions thus specifically include importation of objects stolen abroad. How is an object to be considered stolen outside the U.S. without some sort of reference to foreign law?

2.1.4 The "Multiplicity of Foreign Laws" Argument against McClain

Schultz argued that because 160 nations have differently drafted, "vaguely worded" patrimony laws, following *McClain* would introduce unacceptable "vagueness and uncertainty into the NSPA" by allowing varying foreign laws to determine its application.[30] Schultz further claimed that *McClain* would give "inadequate notice to American citizens as to what cultural objects qualify as 'stolen'" under U.S. criminal laws. He predicted that U.S. museums and dealers would have "no way of knowing which of these laws will be criminally enforced here under the NSPA."[31]

In making this argument, Schultz seemed unconcerned to address the recent explanation, by judges of the same federal district court weighing his case,[32] of how the NSPA does operate fairly when applied in conjunction with *McClain* even if a multitude of foreign laws may be referenced.

Just two years before *Schultz*, in *United States v. Portrait of Wally*, the government sought to confiscate a painting said to have been looted from its owner by a Nazi and imported into the United States in violation of the NSPA by an Austrian museum.[33] Significantly, the *Wally* court rejected the argument of the United States that Austrian law would determine whether the painting was "stolen" under the NSPA. Instead, the court said, Austrian law determined only whether anyone—in this case, the claimed former owner—had an ownership interest in the painting, and U.S. law determined whether the object was stolen. To reach this conclusion, the *Wally* court looked, as *McClain* had done, to a U.S. Supreme Court case, *United States v. Jerome*.[34]

In *Jerome* the Supreme Court examined the federal Bank Robbery Act, which made it a crime to enter a bank intending to commit a felony therein. The question was whether, for purposes of that act, the felony had to be a federal felony or could be a state felony, which might vary among jurisdictions. The Supreme Court held that the underlying crime had to be a federal felony, because it had to be assumed

that Congress in enacting statutes "is not making the application of the federal act depend on state law."[35]

Basing its conclusion on *Jerome*, the *McClain* court held that Mexican law could be examined to see if the artifacts were owned by Mexico, but not to determine whether the objects were stolen under the NSPA. Reference to a foreign nation's declaration of ownership "does not create the state-by-state divergence avoided in *Jerome*," the *McClain* court said.[36] Although the antiquities laws of different countries might lead to different results under the NSPA, the *McClain* court said, the NSPA's "specific scienter requirement—knowledge that the stolen goods are stolen—" protects defendants from being trapped by such a divergence of foreign law.[37]

As the *Wally* court then demonstrated, the federal case law of New York accords with this analysis, as seen in *United States v. Long Cove Seafood, Inc.*[38] In *Long Cove*, the court dismissed an NSPA prosecution of clam diggers who had received wildlife allegedly taken in violation of state conservation laws. The court looked to local law to determine whether anyone owned the clams but then to the NSPA to see if they were stolen. Since no ownership interest was found, such as the *McClain* court found that Mexico had asserted for its artifacts, the *Long Cove* court denied the prosecution.[39] Looking to *Long Cove*, the *Wally* court concluded that under the NSPA, federal law determines "whether an item is stolen, and local law"—which in the *Schultz* case would be Egyptian law—determines only who owns the item.[40]

2.1.5 The "Not in a Criminal Case" Argument against McClain

Schultz attacked *McClain* as having been applied only once in a U.S. criminal prosecution.[41] Not "a single court's decision" now favored the application of *McClain*, and those that did had applied *McClain* only in civil cases.[42]

However, the court in *Wally* followed *McClain* in a civil forfeiture proceeding *based* on violation of a criminal statute—the NSPA. Since *McClain* had been followed in a forfeiture proceeding based on a criminal violation, it is hard to see why *McClain* could not also be followed in a criminal proceeding.

2.1.6 The "Outdated" Argument against McClain

Schultz called the *McClain* decision "outdated, flawed and widely discredited."[43] He claimed that *McClain* was "now considered an obsolete aberration in art law jurisprudence."[44] Yet as recently as 2000 the U.S. District Court for the Southern District of New York (though not a federal appeals court as the *McClain* court was) followed *McClain* in *Wally*.

https://doi.org/10.1017/S0940739102771452 Published online by Cambridge University Press

2.2 THE CCPIA ARGUMENT AGAINST *McCLAIN*

The court should not follow *McClain*, Schultz argued, because after the case was decided, the U.S. adopted the CCPIA, which, Schultz and the art dealers said, preempted using the NSPA with a foreign patrimony law to prosecute antiquities cases.[45] Patrimony laws fundamentally conflict with the CCPIA and should not be enforced here.[46] *McClain* would make the CCPIA superfluous, Schultz argued, because foreign nations would have no reason to seek import restrictions under it from the U.S. and could instead threaten to seek U.S. criminal prosecution "to pressure museums, dealers and collectors to return objects."[47]

2.2.1 CCPIA—Sole U.S. Statute Applicable to Foreign Patrimony Laws?

A brief summary of the CCPIA is useful here. The statute was enacted in 1983 to implement U.S. adoption of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.[48] The CCPIA prohibits two categories of imports into the U.S.: first, "stolen cultural property," defined to mean cultural objects documented as stolen from museums or religious, secular, or public institutions in countries which are parties to the convention. Second, it prevents the import of specific classes of foreign materials with respect to which the U.S. has placed import restrictions in cases of serious situations of pillage, following approval of a request from a foreign signatory, which demonstrates, among other things, that it has taken sufficient measures to protect its cultural patrimony.[49] Cambodia, Italy, Mali, Canada, Nicaragua, Cyprus, Guatemala, Peru, El Salvador and Bolivia have requested and been granted U.S. import restrictions under the mechanism provided in the statute.[50] The CCPIA, Schultz said, showed that Congress "squarely rejected blanket ownership claims of foreign antiquities.[51]

2.2.2 Comment on Schultz's CCPIA Argument

As basis for this interpretation of the CCPIA, Schultz cited only the explanation of a State Department representative, who helped draft the legislation, that "we," perhaps referring to either Congress or the State Department, "were not prepared" to "automatically enforce, through import controls, whatever export controls were established by the other country."[52] But this is hardly the level of evidence, such as a congressional committee report, traditionally given weight in citing congressional intent; moreover, it refers to the enforcement of export controls, whereas the question in *Schultz* was the application of a foreign ownership law to a U.S. antitheft statute.

Schultz did further quote from the CCPIA Senate Report that U.S. actions "*need not be coextensive* with the broadest declarations of ownership" of other nations, and that "U.S. actions in these complex matters *should not be bound* by the characterizations of other countries" (emphasis added).[53] However, such general state-

https://doi.org/10.1017/S0940739102771452 Published online by Cambridge University Press

ments say nothing of the CCPIA's impact on the NSPA. The latter quote, for example, does not specifically say that the U.S. should not be bound by foreign property laws in determining who owns property under the NSPA.

3 GOVERNMENT'S RESPONSE TO THE *McCLAIN* ATTACK

The government argued that the NSPA is the appropriate vehicle for prosecuting the knowing receipt of looted, state-owned antiquities and that Egyptian law was not being "enforced" by its prosecution of Schultz. Courts have long recognized that patrimony laws establish government ownership of antiquities in NSPA and civil cases, the government said.[54]

3.1 GOVERNMENT RESPONSE TO THE COMITY ARGUMENT

Contrary to Schultz, the government said that for comity reasons, U.S. courts must recognize a foreign sovereign's declaration of ownership over property.

The government took issue with Schultz's comity argument that enforcement of foreign patrimony laws would violate the Takings Clause of the U.S. Constitution. Courts must give "absolute recognition" to foreign laws operating within a nation's territory "and do not view them through the lens of the United States Constitution":[55]

> There was simply no "taking" or confiscation *from the defendant* in this case. There was no "taking" by the United States government. And there was no "taking" anywhere within the United States. . . . [The defendant] does not and cannot claim to have any prior, existing right, claim or interest in any of the property at issue in this case. The passage of Law 117 did not in any way . . . constitute a taking of his property interests.[56]

3.2 GOVERNMENT RESPONSE TO THE CCPIA ARGUMENT

The United States argued that criminal NSPA prosecutions are not inconsistent with the CCPIA. In its 1983 passage of the CCPIA, Congress neither overruled *McClain* nor limited the NSPA, the government said, and the legislative history of the CCPIA shows that it did not affect such preexisting remedies.[57] Congress never mentioned foreign patrimony laws, the NSPA or *McClain* in enacting the statute and, in the legislative history, instead expressly stated that the CCPIA did not preempt other remedies, the government said.[58]

3.3 GOVERNMENT RESPONSE TO THE "MULTIPLICITY OF FOREIGN LAWS" ARGUMENT

The U.S. disagreed that it was "enforcing" Egyptian law; instead, "foreign law is relevant to only one issue: whether the foreign nation has clearly declared owner-

ship of its antiquities, which Egypt has done here."[59] The government reiterated that in the *Wally* decision, *McClain* was cited for holding that foreign law would be examined to see only if artifacts were owned by any person, leaving federal law to determine if the objects were stolen.[60] The Second Circuit's decision in *Long Cove* accorded with this analysis, the government said.[61]

As evidence that foreign patrimony laws may be referred to in NSPA cases, the government cited *United States v. Hollinshead*, which upheld an NSPA conviction of dealers and smugglers who conspired to transport in foreign commerce a Mayan stele owned by Guatemala.[62] The government also cited the Southern District Court's *Antique Platter of Gold* decision, holding that an imported object could be confiscated under the NSPA because it may be considered "stolen" if a foreign nation has declared ownership through patrimony laws.[63]

4 THE ARGUMENTS OVER EGYPTIAN LAW 117

As a second arm of the motion to dismiss, Schultz and the dealers said that even if *McClain* were followed, Egypt's Law 117 did not meet *McClain's* standards for clarity in notifying U.S. citizens that Egypt owns its antiquities.[64]

Schultz argued that Law 117 was too ambiguous and that its vague application to items of "archaeological or historical value or significance" made it "impossible to know" which objects would qualify. Schultz added that it was "questionable whether the objects mentioned in the Indictment" would be so considered. He called the law principally an export control regulation, which failed to assert true ownership. Further, Schultz said, Egypt does not even enforce its antiquities ownership law, internationally or internally.[65] He also argued that "Once removed from [their archaeological] locations, the objects lose archaeological importance."[66]

This latter argument was highly dubious. It is precisely the loss of archaeological information that occurs when antiquities are taken from their sites that makes antiquities theft so devastating, archaeology groups told the *Schultz* court, in a friend-of-the-court brief.[67] The first sentence of Judge Rakoff's opinion in *Schultz* suggests that, on this point, he could not have disagreed with Schultz more.[68]

The United States argued that Law 117 was clear enough to put a person of ordinary intelligence—"not to mention the experienced antiquities dealer"—on notice that Egypt owns antiquities discovered after 1983.[69] The U.S. further argued that Egypt sufficiently enforces its antiquities laws.[70]

5 THE DISTRICT COURT DECISION

The court found for the United States, going immediately to the protection of antiquities as the motivation for the indictment, which the court found legally unflawed:

https://doi.org/10.1017/S0940739102771452 Published online by Cambridge University Press

> The marvelous artifacts of ancient Egypt, so wondrous in their beauty and in what they teach of the advent of civilization, inevitably invite the attention, not just of scholars and aesthetes, but of tomb-robbers, smugglers, black-marketers, and assorted thieves. Every pharaoh, it seems, has a price on his head (at least if the head is cast in stone); and if the price is right, a head-hunter will be found to sever the head from its lawful owner. So, at least, is the theory of the instant indictment, which alleges, in effect, that the defendant and one or more co-conspirators arranged to steal highly valuable ancient Egyptian artifacts—including a million-dollar head of Amenhotep III—and fence them in New York.[71]

5.1 A RULING THAT LAW 117 TRANSFERS OWNERSHIP TO THE STATE

The court first rejected Schultz's argument that Law 117 is too vague to give fair notice of which objects have "archaeological or historical importance," explaining that "none of the ancient Egyptian artifacts that is the subject of the instant indictment . . . such as a pharaoh's head and two Old Kingdom painted reliefs . . . remotely raises questions of fair notice under any reasonable interpretation of that definition."[72] Law 117 was not, the court said, primarily regulatory in nature. By its very language it "unequivocally asserts state ownership of all antiquities," requires their recording with the state, prohibits private ownership, possession, or disposal, and requires prompt notification to the Antiquities Authority of discoveries, which are taken into physical possession and stored in museums and storage facilities. The law, the court said, "vests with the state most, and perhaps all, the rights ordinarily associated with ownership of [antiquities], including title, possession, and right to transfer."[73]

This is far more than a licensing or export regulation, the court said, even if the law relaxes some aspects of state ownership where practical, for example in the case of immovable antiquities or antiquities discovered before 1983.[74] The law's purpose, the court concluded, is to transfer ownership to Egypt.[75]

5.2 A FINDING THAT LAW 117 IS ENFORCED IN EGYPT

The court rejected Schultz's argument that Egypt itself did not give effect to the law, on the basis of evidence produced by the government at a hearing convened by the court. The most evidence that the defendant could adduce, the court said, had been a "hypothetical" opinion by an Egyptian law professor at a U.S. law school that Law 117 does not stop Egypt from leaving post-1983 antiquities in private hands so long as state authorities are notified.[76] The United States, on the other hand, presented testimony from the Secretary General to Egypt's Supreme Council of Antiquities that the state takes immediate custody of newly discovered antiquities, "sometimes by the tens of thousands." In addition, the director of criminal investigations for Egypt's Antiquities Police, which employs more than four

https://doi.org/10.1017/S0940739102771452 Published online by Cambridge University Press

hundred police officers, testified that his department prosecutes dozens of serious violations of Law 117, most for trafficking within Egypt.[77] Contrary to Schultz's assertions, the court said, the law requires just compensation for takings, just like U.S. law. Law 117, the court concluded, actually is "a transfer of ownership of Egyptian antiquities to the state, effective 1983."[78]

It should be noted that while the court summarized the evidence for its conclusion that Egypt enforces Law 117, it did not state such enforcement by a foreign nation as a requirement.

5.3 UPHOLDING *McCLAIN* WITHOUT COMMENT

The court did not even discuss Schultz's arguments against *McClain*. Instead, it simply cited *McClain* for the proposition that the NSPA,

> which expressly refers to foreign commerce, has consistently "been applied to thefts in foreign countries and subsequent transportation into the United States" . . . : an implicit recognition of the interest of the United States in deterring its residents from dealing in the spoils of foreign thefts.[79]

Why should it make any difference, the court asked,

> that a foreign nation, in order to safeguard its precious cultural heritage, has chosen to assume ownership of those objects in its domain that have historical or archaeological importance, rather than leaving them in private hands? If an American conspired to steal the Liberty Bell and sell it to a foreign collector of artifacts, there is no question he could be prosecuted under section 2315. Mutatis mutandis [with the respective differences having been considered], the same is true when, as here alleged, a United States resident conspires to steal Egypt's antiquities.[80]

The court's choice of this artifact for its analogy is interesting, because the Liberty Bell was never acquired by a government from a private owner but instead was originally commissioned and always owned by a government entity.[81] The court seems to be saying that there is no difference between undiscovered antiquities claimed by a government, sight unseen, and an object that is openly government property.

5.4 SCIENTER IS ESSENTIAL

The court repeated the scienter requirement for the NSPA, stating that the government had to prove that Schultz "knew he was dealing in stolen goods, an essential element of a section 2315 violation."[82]

5.5 THE CCPIA

The court rejected Schultz's arguments that enactment of the CCPIA superseded the application of *McClain* in NSPA proceedings.

Here, too, the court appeared even impatient with Schultz's arguments, dismissing them in a few brief sentences. "[S]uffice to say," the court wrote, "that there is nothing in the language or history of the Cultural Property Implementation Act to support th[e] unlikely result" that a civil customs law could supersede the criminal NSPA when applied to the same subject matter. The Senate report expressly stated that the act "neither pre-empts state law in any way, nor modifies any Federal or State remedies."[83]

The court also stated, citing *United States v. Stephenson*, that there was no inconsistency in applying both the CCPIA and the NSPA to imported stolen antiquities.[84] The CCPIA "is chiefly concerned with balancing foreign and domestic import and export laws and policies, not with deterring theft."[85] By contrast, the NSPA "only applies in cases of intentional theft and knowing disposal of stolen goods," the court said, adding that even the primary academic proponent of the CCPIA, Paul M. Bator—quoted by Schultz as a critic of *McClain*—agreed that criminal prosecution was appropriate in such cases.[86]

The court's rejection, citing *Stephenson*, of Schultz's CCPIA argument suggests an uphill battle for this theory on appeal. In *Stephenson*, the defendant, an official at the Commerce Department, was charged with violating the Hobbs Act, which prohibits obstruction of commerce by extortion. The defendant argued that Congress did not intend the Hobbs Act to apply to public officials and, as evidence for this, cited the later enactment of milder criminal statutes that did expressly apply to federal officials. However, the Second Circuit rejected this argument, citing a U.S. Supreme Court decision that refused "to narrow the plain meaning of even a criminal statute on the basis of a gestalt judgment as to what Congress probably intended."[87] Stephenson could cite no legislative history, the Second Circuit said, that the later, more specific act should prevail where the earlier, more general one was silent; his argument therefore ignored the basic principle that overlapping statutes "should be construed to coexist" where there is "no contrary legislative intent and no repugnancy between the provisions."[88] Though the statutes were similar, they "serve somewhat divergent purposes and easily coexist," the Stephenson court said, concluding that the government could "prosecute under whichever section is more suitable to the acts committed."[89]

Invoking *Stephenson*, the *Schultz* court found sufficient "divergent purposes" allowing coexistence between the CCPIA and NSPA, contrasting the former's "nuanced and complicated approach" to import controls on cultural property with the NSPA's concern with deterring theft.

5.6 DISMISSAL OF OTHER ARGUMENTS

The court dismissed Schultz's other arguments as "sufficiently meritless as not to warrant discussion." Among other things, Schultz had argued that he could not be prosecuted because Egypt had not named him as a coconspirator when it prosecuted other members of the conspiracy. The court said that this did not bind it and that Schultz was not even a party to the other proceeding.[90]

6 TRIAL AND SENTENCING

In February 2002 Schultz was convicted on the conspiracy count alleged in the government's indictment. At sentencing, Schultz claimed that the head of Amenhotep III, which he sold for $1.2 million, was worth only $20,000–$30,000 because Tokeley-Parry had restored it.[91] However, Judge Rakoff rejected this, finding that the stolen antiquities Schultz conspired to receive were worth more than $1.5 million, including objects of archaeological and historical importance. Schultz was sentenced to thirty-three months in prison and fined $50,000. He was also ordered to return an ancient Old Kingdom relief to Egypt as restitution.[92]

7 SCIENTER "SAFE HAVEN" AND THE JURY INSTRUCTIONS

Art dealers had argued that permitting the NSPA indictment based on Egyptian law would "have a catastrophic impact on the art world and the public interests it serves" and would make it impossible for dealers to "risk handling" antiquities. "Dealers, collectors and museums will be forced to abandon the trade and collection of any objects that any foreign government may ultimately claim," the dealers said. "Existing collections also will be affected: collectors and museums that acquired objects in good faith reliance on U.S. law will be placed at risk" of NSPA prosecution or forfeiture, they added.[93]

In theory, this is not a problem for honest buyers, as the *Schultz* court took pains to reiterate the "scienter" requirement that in any NSPA prosecution the defendant must have known the objects to be stolen. However, the jury instructions in the *Schultz* case may give pause to buyers.

In instructing the jury, the court said that the government had to prove that Schultz, even if he did not specifically know Egyptian law, "was at least aware . . . that under Egyptian law the Egyptian government owned all recently discovered antiquities of any archaeological or historical importance."[94]

As Schultz had argued that there was no proof that he did know the gist of this law, the instructions stated that if Schultz "honestly believed, even if erroneously" that the antiquities, even if smuggled out of Egypt in violation of an

https://doi.org/10.1017/S0940739102771452 Published online by Cambridge University Press

Egyptian customs or export law, "were not obtained in violation of any Egyptian ownership right," he would not be guilty.

However, the instructions continued,

> 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 *vested 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.[95]

The instruction creates several concerns for antiquities buyers, including collectors, dealers and museums.

7.1 PROBLEM: "PURPOSEFULLY IGNORANT" OF THE FACTS?

Must an antiquities buyer learn all the facts? In stating that a defendant "may not purposefully remain ignorant of . . . *the facts*" in order to escape legal consequences, the instruction suggests that if Schultz had known the law but had "as a matter of choice, consciously avoided learning" the facts of the objects' excavation, he might equally be in deep water. Under the instruction, 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.

This does not appear to suggest that honest buyers must dig up all the facts, which they might never be able to know, but it does say that a buyer who has a pretty good hunch that the facts are bad and yet "purposefully remains ignorant" will be presumed to know the "unlearned" bad facts.

7.2 DUTY TO LEARN FOREIGN LAW?

Does the instruction mean that buyers must learn the law of a foreign nation before dealing in or acquiring its antiquities? Although the buyer is not deemed to know the law if he or she "actually believed" the objects were not government owned, it may be hard to prove such actual belief, because, according to the instruction, a suspicion that ownership laws "probably" apply, coupled with a "conscious avoidance" of finding out, means that the buyer knew the law. On a practical level, it is hard to know how far a prosecutor would have to go to prove guilt on this point.[96]

The instruction appears to carry a strong caution to antiquities buyers, including those who may previously have seen their investigative role as limited to questions such as authenticity. A buyer who knows enough to ask about a nation's ownership laws, but deliberately fails to do so, cannot claim he did not know there were any. On the other hand, for the totally scrupulous, and the totally uninformed, the *Schultz* decision poses no worries.

NOTES

1. United States v. Schultz, 178 F. Supp. 2d 445 (S.D.N.Y. 2002) [hereinafter *Schultz*].

2. 545 F.2d 988 (5th Cir. 1977) ["*McClain* I"]; 593 F.2d 658 (5th Cir. 1979) ["*McClain* III"] *cert. denied,* 444 U.S. 918 (1979).

3. United States v. An Antique Platter of Gold, , a/k/a Gold Phiale Mesomphalos c. 400 B.C., 991 F. Supp. 222 (S.D.N.Y. 1997), *aff'd on other grounds,* 184 F.3d 131 (2d Cir. 1999), *cert. denied,* 528 U.S. 1136 (2000) [hereinafter "District Court *Antique Platter* decision"]. United States v. Portrait of Wally, a painting by Egon Schiele, defendant in rem, 105 F. Supp. 2d (S.D.N.Y. 2000) [hereinafter "District Court *Wally* decision"].

4. In United States v. An Antique Platter of Gold, a/k/a Gold Phiale Mesomphalos c. 400 B.C., 184 F.3d 131 (2d Cir. 1999) [hereinafter "*Antique Platter of Gold,* Second Circuit decision"], the Second Circuit avoided reaching this question. *See* Martha Lufkin, Forfeiture of an Antiquity Claimed by Italy with Help from the U.S. National Stolen Property Act: the Steinhardt Case, 5:1 *Art, Antiquity & Law* 57 (March 2000). National Stolen Property Act, 18 U.S.C. § 2314.

5. *See, e.g.,* United States v. An Antique Platter of Gold, a/k/a Gold Phiale Mesomphalos c. 400 B.C., Appeal to the U.S. Court of Appeals for the Second Circuit, Brief of *amici curiae* American Association of Museums et al., March 6, 1998, at 37 *et seq.*, calling *McClain* "widely discredited" and citing criticisms from Paul M. Bator, An Essay on the International Trade in Art, 34 *Stanford Law Review* 275, 347–54; James F. Fitzpatrick, A Wayward Course: The Lawless Customs Policy Toward Cultural Properties, 15 *New York University Journal of International Law and Politics* 857, 862–64, 874–75 (1983); and James R. McAlee, The McClain Case, Customs, and Congress, 15 *New York University Journal of International Law and Politics* 813, 822–28 (1983).

6. 19 U.S.C. § 2601 *et seq.*

7. 895 F. 2d 867, 872 (2d Cir. 1990).

8. These efforts by foreign nations can be seen in *Antique Platter of Gold,* Second Circuit decision (Italy successfully joined federal confiscation action as claimant and obtained the claimed platter); Republic of Turkey v. OKS Partners, 1994 U.S. Dist. LEXIS 17032 (D. Mass. 1994) (Turkey brought replevin suit in Massachusetts to recover ancient coins); and the *Schultz* decision. For details of the dealer's conviction, see Martha Lufkin, New York Dealer is Sentenced to 33 Months in Prison for Selling Illicitly Excavated Egyptian Antiquities, <http://www.theartnewspaper.com>, June 2002.

9. Lufkin, *supra* note 8; also based on the author's conversations with museum attorneys, March–June 2002.

10. Indictment, *Schultz,* 01 Cr. 863(JSR) [hereinafter "Indictment"].

11. *Id.*

12. *Id.*

13. *Id.*

14. Tokeley-Parry was not identified in the indictment but was identified in the press. *See* Cristina Ruiz, in Martha Lufkin, Test Case for the Trade, 121 *Art Newspaper,* January 2002, at 14.

15. Indictment.

16. *Id.*

17. *Id.*

18. The defendant was found guilty in any event. *See* Martha Lufkin, New York Dealer, Frederick Schultz, Found Guilty of Dealing in Stolen Egyptian Antiquities, 123 *Art Newspaper,* March 2002, at 15.

19. Memorandum in Support of Defendant's Motion to Dismiss the Indictment, in *Schultz* [hereinafter "Schultz's Brief"], *passim.*

20. Brief of the National Association of Dealers in Ancient, Oriental & Primitive Art, the Art Dealers Association of America, the International Association of Professional Numismatists, and Christie's Inc. as *amici curiae* in Support of Defendant, *Schultz* [hereinafter "Dealers' Amicus Brief"], *passim.*

21. Schultz's Brief, *passim.*

22. To be considered theft, *id.* at 34, citing *McClain* I, 545 F.2d at 1000. Quote is *id.*, citing *McClain* III, 593 F.2d at 670.

23. Schultz's Brief at 15–16.

24. *Id.* at 14.

25. "[N]or shall private property be taken for public use, without just compensation."

26. Schultz's Brief at 17, referring to the Archaeological Resources Protection Act, 16 U.S.C. § 470aa *et. seq.*, and the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 4001 *et. seq.*

27. Schultz's Brief at 29.

28. 18 U.S.C. § 2314.

29. 18 U.S.C. § 2315.

30. Schultz's Brief at 30–31.

31. *Id.* at 31.

32. Decisions of judges of a federal district court are not binding precedent governing later decisions of any federal district court, including the very district court that made the earlier decision.

33. United States v. Portrait of Wally, 105 F. Supp. 2d (S.D.N.Y. 2000).

34. 318 U.S. 101 (1943).

35. *Id.* at 104, not quoted by the *Wally* court.

36. *McClain* I, 545 F.2d at 1001 n.30, quoted in the District Court *Wally* Decision, 105 F. Supp. 2d at 291.

37. *Id.*

38. 582 F.2d 159 (2d Cir. 1978).

39. *Id.* at 165, not quoted in the District Court *Wally* Decision.

40. District Court *Wally* Decision, 105 F. Supp. 2d at 292. For a more detailed discussion of the *Wally* and *Long Cove* cases, *see* Martha Lufkin, Why Nazi Loot Ceased Being "Stolen" when U.S. Forces Seized It in Austria: The Federal "Schiele" Case, 5:3 *Art, Antiquity & Law* 305 (2000).

41. Schultz's Brief at 14.

42. *Id.* at 22.

43. *Id.*

44. *Id.* at 23.

45. Convention on Cultural Property Implementation Act, *see supra* note 6. Schultz's Brief and Dealers' Amicus Brief, *passim.*

46. Schultz's Brief at 15–16.

47. *Id.*

48. 823 U.N.T.S. 231 (1971).

49. 19 U.S.C. §§ 2601 to 2609.

50. *See* Chart of Current and Expired Import Restrictions Under the Convention on Cultural Property Implementation Act, <http://exchanges.state.gov/culprop/chart.html>, U.S. Department of State, Bureau of Educational and Cultural Affairs.

51. Schultz's Brief at 15.

52. *Id.* at 15, citing Leonard D. Duboff, Proceedings of the Panel on the U.S. Enabling Legislation of the UNESCO Convention, 4 *Syracuse Journal of International Law and Commerce* 97, 110113 (1978) (statement of Mark B. Feldman, Deputy Legal Advisor for the United States Department of State).

53. *Id.* at 16, citing S. Rep. No. 564-97, at 27 (1982).

54. Government's Memorandum in Opposition to Defendant's Motion to Dismiss the Indictment, in *Schultz*, [hereinafter "Government's Brief"] at 3–14.

55. *Id.* at 19–21.

56. *Id.* at 21; emphasis in original.

57. *Id.* at 30–33.

58. *Id.* at 25.

59. *Id.* at 2.

60. *Id.* at 7, quoting District Court *Wally* Decision at 292, 291.

61. *Id.* at 8.

62. *Id.* at 10, citing 495 F.2d 1154, 1155 (9th Cir. 1974).

63. *Id.* at 11.

64. Schultz's Brief at 33–43.

65. *Id.* at 42–43.

66. *Id.* at 39 n.32.

67. Brief of the Archaeological Institute of America, the American Anthropological Association, the Society for American Archaeology *et. al.*, *amici curiae* in support of the United States in *Schultz* at 1–3.

68. *See* section 5, *infra*.

69. Government's Brief at 33.

70. *Id.* at 33–45.

71. *Schultz*, 178 F. Supp. 2d at 446.

72. *Id.*

73. *Id.*

74. *Id.* at 446–447.

75. *Id.* at 447.

76. *Id.*

77. *Id.* at 448.

78. *Id.* at n. 5; *Id.* at 448.

79. *Id.*, citing *McClain*, 545 F.2d at 994.

80. *Webster's Third International Dictionary*; *Schultz*, 178 F. Supp. 2d at 448.

81. The Liberty Bell was commissioned "By order of the Assembly of the Povince [sic] of Pennsylvania for the State house in the City of Phila 1752" from Whitechapel Foundry in England. After it cracked from a single stroke of the clapper, it was recast twice with the addition of various metals. The remolded bell remained in the then tower of what is now Independence Hall. It was eventually bought as part of the State House by the City of Philadelphia in 1816, which owns it today, with the U.S. National Park Service as custodian. *See* David Kimball, *The Story of the Liberty Bell* 13–39 (Eastern National, Philadelphia 1989).

82. *Schultz*, 178 F. Supp. 2d at 449.

83. *Id.*, citing S. Rep. No. 97-564, at 25 (1982).

84. *See supra* note 7. United States v. Stephenson, 895 F.2d 867 (2d Cir. 1990).

85. *Schultz*, 178 F. Supp. 2d at 449.

86. *Id.*, citing Paul M. Bator, An Essay on the International Trade in Art, 34 *Stanford Law Review* 275, 353 (1982); cited in Schultz brief at 24–25.

87. *Stephenson*, 895 F.2d at 872, quoting Garcia v. United States, 469 U.S. 70, 78 (1984).

88. *Id.*, quoting United States v. Bradley, 812 F.2d 774, 779 (2d Cir.), *cert. den.*, 484 U.S. 832 (1987), citing United States v. Batchelder, 442 U.S. 114 (1979).

89. 895 F.2d at 872.

90. *Schultz*, 178 F. Supp. 2d at 449.

91. Martha Lufkin, New York Dealer Is Sentenced to 33 Months in Prison, *supra* note 8.

92. Statement of James B. Comey, U.S. Attorney for the Southern District of New York, June 11, 2002.

93. Dealers' Amicus Brief at 1, 9.

94. *Schultz*, The Court's Instructions of Law to the Jury, Second Element—Membership in the Conspiracy.

95. *Id.*; emphasis added.

96. Hurdles could arise in proving lack of knowledge. A museum professional has wondered aloud how difficult, or legally costly, it might be for an innocent museum curator to prove lack of knowledge to a jury if faced by a zealous prosecutor. There may be no procedural shortcut to settle this fact, short of trial.