

TESTIMONY OF JOHN FRYAR
UNITED STATES SENTENCING COMMISSION
PUBLIC HEARING
FEBRUARY 26, 2002

Good Morning, my name is John Fryar. I am an enrolled member of the Pueblo of Acoma in New Mexico and a criminal investigator for the Bureau of Indian Affairs. I appreciate the opportunity to talk with you regarding my work and experience in the investigation and prosecution of crimes involving the Archaeological Resources Protection Act (ARPA) and the Native American Graves Protection and Repatriation Act (NAGPRA). First I want to commend the Sentencing Commission for it's work in proposing a new guideline which specifically addresses crimes involving the damage and destruction of cultural resources. In my work, I have been very frustrated by how the system allows these criminals to get away with only minimal sentences or in some cases, no sentence at all. These looters are then able to get back into the field and continue their desecration of human burials while stealing anything that may have value to sell on the black market. My frustration as a criminal investigator is great but it does not compare to the level of frustration and anger that tribal communities feel when all they can do is watch their culture be erased, site by site. This proposed guideline is one step in ensuring that the punishment received for these crimes approaches the harm caused to the tribal community.

I have investigated cultural resources crimes for approximately fifteen years. I first became aware of these crimes while working for the United States Forest Service in New Mexico. I worked for the Forest Service for over fifteen years, about five years as a uniformed Law Enforcement Officer. In 1991, I transferred to the Bureau of Land Management as a Special Agent where I was assigned to the Four Corners ARPA Task Force which was based in Santa Fe, New Mexico. The task force was primarily an undercover unit which included various land management agencies and was successful in prosecuting a number of cases in the four corners states of Arizona, New Mexico, Utah and Colorado. In 1995, I transferred to the Bureau of Indian Affairs (BIA) as the only criminal investigator tasked with working ARPA and NAGPRA violations on a national level. At present, I am the only full time ARPA investigator for the BIA and the Department of Interior. My case work covers the entire country and I have traveled all over the country working not only investigations but providing ARPA training for tribes and other law enforcement agencies. I have witnessed firsthand the devastating impact looters have had on individual Indians and tribal communities.

The ARPA is over twenty years old now and NAGPRA over ten years old. Newspapers and magazines have published countless articles and television shows such as National Geographic and Nightline have aired segments that have addressed looting and vandalism on our public lands and on Indian reservations. As a result of some of this publicity, there has been a dramatic drop in the instances of looting caused by "mom and pop" out for a Sunday picnic or damage caused by a boy scout troop out for a day hike. While this type of damage caused by the casual hiker still occurs, the reports of these incidents are uncommon.

The Professional Looter

The cases that I am seeing in the field now are the result of the hard core looters, the grave robbers, the ones I refer to as the professional looters. These professional looters could care less if a federal law prohibits grave robbing or damage to cultural resources and they have no regard for centuries old culture, heritage or history. The majority of these looters already have criminal histories, usually drug related (methamphetamine) or violence related (domestic abuse and assaults). Incidentally, these looters are also usually involved in other illegal trafficking activities, such as cactus rustling and sales of endangered species.

Let me give you an illustration as to how professional looters operate. First, they educate themselves about the locations of archaeological sites and the kinds of artifacts and grave goods that may be found at the sites. Many have taken classes in archaeology and anthropology, some have even volunteered with land management agencies as archaeological technicians to learn more about archaeology in their areas. They are also very adept at using technology to assist in their criminal activities - using Global Positioning Systems (GPS) and conducting extensive computer research to locate specific sites. These individuals are deeply proud of what they do and document their illegal activities with photographs and videotapes. This documentation serves two purposes: it provides bragging rights to other looters about how good they are and it also increases the value of the items illegally taken by providing a context for the objects they are selling on the black market.

These professional looters will go to great lengths not to get caught. We have been told that some looters become familiar with the ceremonial schedules on various reservations so that they can operate in the back country while the police officers and tribal rangers are working at the ceremonial events. Many looters will dig at night using the cover of darkness to mask their activities. They usually park vehicles some distance from the site they are working and then hike in and carry their tools, such as probes, shovels, trowels, flashlights, and screens. Once it is dark, they begin their pattern of destruction in a very methodical manner. They use probes to locate the walls of a pueblo and burial sites. Many looters have bragged about how good they are when using their probes at being able to tell if they are hitting a rock, a pot or a skull. Once an item is located or the walls of a site have been defined, they will use shovels to remove the valuable items. One example of how calculating the looters are in masking their work is that I have investigated crime scenes where the looters have cut out the top layer of earth and set it aside before they begin their work. The looters then dug holes three feet deep, removed the artifacts, filled the holes in with back dirt, placed the top portion of the earth back over the holes and then brushed out the piece and the area around it to look like it had never been disturbed.

Of course this example is just one technique of the professional looter. Many looters are much bolder and do not limit themselves to small tools that can be carried in a backpack but will use backhoes and other heavy equipment to completely devastate an area. The looters remove all the valuable and sellable items out of the ground and then simply bulldoze over the entire area. Once this type of destruction has happened, it is impossible to ever know the historical and archaeological context of the site and that information is lost forever.



These professional looters believe that they have an inherent right to “treasure hunt” or steal from these grave sites. Many of them grew up in rural western states and have looted and collected artifacts as kids along with their families. Many looters are better at locating archaeological sites than the local law enforcement officers are. Since they are so proud of their abilities and believe that their chances of getting caught are almost non-existent, they routinely brag of their discoveries to friends and relatives.

Case Study of a Professional Looter

I will give you a good example of a case study of a professional looter. In 1992, I was involved in an investigation on the Zuni Reservation in New Mexico. A tribal member had turned himself in as he could not sleep at night because of the crimes he had committed. This tribal member was a sheep herder and addicted to alcohol. The crimes he had committed involved the selling of ceremonial items from Zuni known as masks or friends. Native Americans believe these friends are living, breathing spirits. They pray to them, ceremonially feed them and care for them. These masks are the items that have been defined as “cultural patrimony.” These objects do not belong to any individual in the Tribe and cannot be sold by any individual.

The tribal member was stealing ceremonial masks for a non-Indian from Payson, Arizona, named Rodney Tidwell. Tidwell had befriended the tribal member, providing money for alcohol and giving him presents. Law enforcement officials had received additional information from other reservations in New Mexico and Arizona regarding Tidwell’s illegal trafficking of ceremonial items. We even had documentary evidence of some attempted sales he was involved in with very high profile individuals in Santa Fe, New Mexico.

The tribal member agreed to assist us in the investigation and a telephone call was placed to

Rodney Tidwell. I watched the sale go down at four in the morning and watched Tidwell browbeat the tribal member down on the price for the item he had for sale. Then I watched as he told the tribal member he wanted more masks but he wanted them “fully dressed” meaning that he wanted everything on the masks, including feathers and all attachments.

The tribal police detained Tidwell and interviewed him where they discovered a loaded gun in his car. At the same time tribal police were interviewing him, a team of officers were executing a search warrant of the Tidwell residence in Payson, Arizona. The tribal police eventually released Tidwell. The team executing the search warrant at his home in Payson seized many items of cultural patrimony along with eagle feathers and whole migratory birds that had been shot and put in the freezer to be used as trading material on the various reservations. Some of the information found during this search led to other individuals and other search warrants. In October of 1995, Tidwell was sentenced for illegally purchasing the Zuni mask from the tribal member. He received three years probation and a small fine.

In April of 1996, while working an undercover operation in Arizona, I was personally introduced to Rodney Tidwell. At this point in time, Tidwell had been on probation for less than six months and I worked the next year and a half buying items of cultural patrimony from him in New Mexico and Arizona. Tidwell offered to sell me the same types of items we had just prosecuted him for in the Zuni case. During my contacts with him, he taught me how not to get caught in what he called “stings” and to watch for body wires. He taught me what to say and how to act if I was on a reservation and stopped by the police. He taught me what to say and how to act if a tribal member became upset during a negotiation. He told me what was legal and what might not be legal on the various reservations and how to hide these items during transport.



At the end of this undercover portion, a search warrant was executed. I was in Tidwell’s residence as the vehicles carrying members of the search warrant team drove up and he had me help him hide the masks we had been looking at. During the search, the authorities seized scrapbooks, newspaper articles, photographs and many more documents that showed his knowledge of the crimes he had been involved - in including copies of the ARPA and NAGPRA statutes. It was also during this search that he threatened to “blow” my head off.

Through the use of the documents seized during the search, I was able to prove Tidwell's criminal activity dating back to 1970. The search produced citations from the White Mountain Apache reservation in Arizona for damaging archaeological sites, citations from the Tonto National Forest for digging in Indian ruins, letters from the Forest Service trying to get him to stop his looting activities and partial copies of a case from the Tonto National Forest for looting in the 1980's. He had been prosecuted in federal court for looting and while under indictment, had been caught digging another burial site on the national forest. He had entered into a plea agreement in that case to pay a fine, forfeit his vehicle and probation. The following poem was seized during this search warrant.

Rodney the lone grave robber
Had a very shiny pick.
And if you ever met him
You would even say he's "sleazy"
And of the other neighbors
Laughed and called him strange.
They thought the Indian's spirits
Had put his mind in disarray.

But then one sunny-summer day
Police came to say
Rodney if you don't stop now
I'll take you to the loose-cow

Rodney thought this whole thing thru
And shouted out with glee
I can do it by moonlight
And then no one else can see
Now watch for Rodney sitting
in jail
Jason and Pat won't go his bail

Other
seized during
showed
as a backhoe
earned \$7500

documentation
the search
Tidwell worked
operator and had
the previous year.

At the time I was working with him, his residence was up for sale for \$640,000. He dealt strictly in cash with tribal members and the mark up of the "Black market" material he was selling to me was over one hundred times the price he paid for the items. I was able to locate the tribal member from the Hopi Reservation who was involved in this case and received confessions during each of the three interviews I did with him. This tribal member committed suicide before the trial took place. The trial took two weeks and Tidwell was convicted of twenty felony counts including ARPA, the illegal trafficking of Native American cultural items, theft from tribal organizations and conspiracy. Rodney Tidwell was sentenced to serve only thirty three months in jail and a \$10,000 fine. This minimal sentence was received after showing a history of almost thirty years of the same type of illegal behavior. The thing that really sticks with me throughout all of these investigations is the callous attitude and behavior that these "professional looters" all seem to exhibit. The following is another poem found in Tidwell's scrapbook that sums up his level of animosity towards other human beings and ancient cultures.

Wiggins 1971

An Indian walks softly,
Holds his head up high,
World has treated him badly,
Yet he seems too proud to cry.

He remembers his Indian ancestry,
Which he desperately wishes to save,
Returns to talk with his grand father's
chief.

But there is a gash in his grave,
His grand father's legs are thrown on
the ground,
His head lies there in a sack,
And some many stands on his petrie box,
Stealing beads from his back.

S.

I have
into some
about one

gone
detail
looter

who has done incalculable damage to many Indian reservations and our public lands because I think it is important for the Commission to understand how most of these professional looters operate. I think that the behavior exhibited by just this one individual illustrates why it is so important for the guidelines to be amended and a new one established for cultural resources crimes. Compiling evidence in these cases often takes years of investigation and involves the cooperation of many law enforcement agencies. While Tribes feel that the damage done by these looters is incalculable, it is good to know that if a looter is successfully prosecuted, his sentence may now be more commensurate with the harm that he has caused. Now I would like to briefly address some of the specific areas in the proposed guideline.

Items of Cultural Patrimony

Many tribes have suggested that the proposed guideline include an enhancement when items of cultural patrimony are damaged, stolen or destroyed. For far too long, the non-Indian world has viewed items of cultural patrimony as merely exquisite examples of Indian art and has ignored the ceremonial and traditional meanings that give these objects significance. Cultural patrimony has been defined in NAGPRA as “an object having an ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.” 25 U.S.C. 3001(3)(D).

Objects of cultural patrimony derive their importance from their ceremonial place in tribal society and they are not just beautiful art objects. I have already mentioned how the Zuni and Hopi masks were important items for sale in the Tidwell investigations. These Zuni masks or friends are critically important to the ceremonial life of the Zuni. Indeed, in my investigation, one tribal member was so torn up about his misuse of the masks that he voluntarily turned himself into tribal authorities so that he could sleep at night. In the investigation involving the sale of Hopi masks, a tribal member committed suicide because he had tried to sell the sacred masks. Objects of cultural patrimony are very powerful not because they are beautiful but because of their integral role in tribal culture.

An object of cultural patrimony evolves in stages and it is analogous in many ways to a birthing process. First, the materials are gathered to create the object. This is the period of gestation for the item, just like that of a child. Then the object is “born” and more ceremonies are performed and the object takes on its role in the ceremonial life of the Tribe just as a child grows and learns to be a member of the society in which he lives. Depending on the object, they are fed, purified, and cared for much in the same manner in which we care for and educate our children about our beliefs and traditions. Because the object has become an integral part of our society, just as each individual child does, these items are irreplaceable. No one would ever suggest after the loss of a child that the parents should just go have another child - it is the same situation for items of cultural patrimony. These items are unique because of the ceremonies performed and because of the symbolism that they represent in the Tribe and cannot be merely replaced by buying additional

materials and creating a new object. For these reasons, I agree with the other tribal commentators that an enhancement is justified in the new guideline for damage or theft of items of cultural patrimony.

Upward Departure

I believe that it is important for the Commission to give some guidance to the courts to help them determine under what circumstances an upward departure from these guidelines would be warranted. As a tribal member, it is difficult for me not to see these crimes as the most heinous and deserving of the harshest punishment in all instances. However, in my many investigations, I have seen how some individuals are truly without conscience in their actions. I think that Tidwell's repetitive pattern of ignoring the law and the poems he wrote exhibit such disregard for other people and cultures that an upward departure could be warranted in a case like that. Since this guideline will be new and unfamiliar to most courts, the Commission should advise the courts that some situations may warrant an upward departure from the guidelines.

Conclusion

Members of the Commission, I appreciate the opportunity to come before you and provide a perspective from the field. These investigations involve an incredible amount of work on the part of law enforcement officials to successfully prosecute these cases. The amount of damage we are seeing on the ground and the constant desecration of our graves and stealing of our cultural heritage and history is unbelievably disturbing to Native American peoples. So the prosecution of these cases becomes critically important to tribal communities in that there is some sense of justice for these looters. While no sentence will ever be able to replace the damage and harm done to our people by these looters desecrating and digging up our ancestors, the proposed guideline is a good attempt to assure that these criminals receive a sentence commensurate with the damage they have caused. The fact that these grave robbers may spend time in jail for their crimes may help the tribal communities begin their healing process and continue with their cultural traditions.

Thank you for the opportunity to speak with you this morning and again, I want to commend the Commission for all its hard work in getting us to this point.