Chapter 5
Cases in Jurisprudence and in the Press

A romantic view of art must in no way interfere with awareness of its illegal use. Many cases have come to light involving the laundering of money by this means. These occur often, and publicly.

This must surely come as no surprise to even the most innocent among us, whether we refuse to see, or lack any interest in understanding the origins of that money intended for art—to say nothing of its use for illegal purposes. It is in the long run a threat to art, and threatens to compromise our cultural heritage and even the government's ability to stem the advance of organized crime.

There is a need to rethink our methods of selling, buying and making donations in the art market. Due diligence must be brought to bear on the authenticity problems of cultural goods. Simply put, we must carefully manage all dealings involving artistic productions.

Following is a list of decisions and press coverage showing that art has indeed been used as yet another instrument in the laundering of dirty money.

5.1 Jurisprudence

5.1.1 United States v. Birbragher, 603 F.3d 478 (8th Cir. 2010)

In this case, in northern Iowa, the defendant, Orlando Birbragher, who was not a physician, was sentenced to 35 months for conspiracy to distribute controlled substances and conspiracy to launder money, to be followed by two years of supervised release. The appellant alleged that the sentence exceeded the maximum penalty provided, and was therefore null and void. The court concluded that the Controlled Substances Act (CSA) was not unconstitutionally vague, and therefore no violation of due process could be alleged.

Orlando Birbragher was alleged to have become involved with physicians and pharmacists in the illegal distribution of drugs over the Internet. He pled guilty in

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court. The amount of $2,465,209.92 was forfeited, and his petition to vacate the complaint was denied.

Between January 2003 and May 2004, the defendant and others were the principal owners and managers of the *Pharmacom International Corporation* (*Pharmacom*), a company that used the Internet (www.buymeds.com) to distribute controlled drugs, allowing users to order the drugs and make payment with credit cards, without checking buyers' identities or requiring a doctor's prescription. *Pharmacom* hired drugstores to fill medical prescriptions which were then downloaded and the drugs shipped off to customers. Thus over 246,000 prescriptions for controlled substances worth more than $12.5 million were filled. The business was deemed illegal.

The money laundering involved the use of the proceeds of the crime for the payment of affiliated websites that in turn forwarded the orders to the *Pharmacom* website, where doctors or alleged doctors made up prescriptions for the company and the drugstores. Furthermore, transactions included transfers of funds to bank accounts controlled by the accused and his company, as well as to another person (an investor). That money was used to acquire jewelry, real estate, artworks and services such as charter flights, and also made it possible to rent a number of vehicles and pay off investment fees.

The first plea agreement between prosecution and defense attorneys was considered by the court to be a contract between the government and the accused, by the terms of which the latter was required to waive all rights to appeal.

The court held that both the plea agreement and the waiver of appeal rights were fully informed and voluntarily entered into, so the appeal was denied.

5.1.2 United States v. Marsh, 164 F.3d 632 (9th Cir. 1998)

Here the defendant, Violet M. Marsh, appealed the decision of the U.S. District Court for the Western District of Washington, in which she was found guilty of 22 counts of assorted criminal activities, including bankruptcy fraud, perjury in bankruptcy court and money laundering.

The court found that there had been no abuse of discretion in examination of the evidence for or against, and that the decision was in line with U.S. sentencing guidelines.[1]

Interestingly enough, the seizure of goods was also disputed, for the defendant claimed that they were incorrectly described in the search warrant. According to the court, the warrant set forth the need to search for and seize hidden goods, specifying a work of art and giving sufficient description of the type of artwork sought.

[1] U.S. Sentencing Guidelines Manual § 3B1.1(a) provides for an increase in the offense level if the defendant was the organizer or leader of a criminal activity that involved five or more participants or if the defendant's participation was otherwise extensive. Under the provision's plain language, the court need only find that there were at least five participants in the criminal activity, and the court can count the defendant among the five.

5.1.3 United States v. Amiel, 889 F. Supp. 615 (E.D.N.Y. 1995)

The three defendants were indicted on 30 counts of fraud by interstate mailing of artworks between 1988 and 1991. They were arrested on January 30, 1992. The charges stated that there was a scheme in place selling prints of works by well-known contemporary artists as if they were originals. Prior to criminal proceedings, the U.S. government filed a civil forfeiture action in which money laundering was also alleged to have taken place. Hence there were two forfeitures: in criminal and civil proceedings. Appellants claimed that there was a total lack of proportion between the seizure and the original losses through unlawful activity. Yet the court found that the duration of the fraudulent scheme, combined with the total number of works sold and their broad distribution, made it impossible to completely assess the damage. The criminal and civil forfeiture procedures were, in the view of the court, a single, coordinated prosecution effort. Allegations of double jeopardy were thus found to lack merit.

Defendants Kathryn Amiel, Joanne Amiel and Sarina Amiel were given prison sentences of 78, 46 and 33 months, respectively, to be followed by three years of supervised release, and were all assessed a fine.

On May 10, 1995, the defendants filed a malpractice action against the attorneys who had represented them in the civil forfeiture proceeding, in an effort to raise a sum equal to the civil asset forfeiture imposed ($16.5 million). The Attorney General's office was opposed to this, and argued that the court would make a mockery of justice if it were to entertain such a claim.

This case shows that asset forfeiture actions may be filed in tandem.

5.1.4 United States v. Ciarcia, 3:04CR172 AWT, 2006 WL 1801764 (D. Conn. June 28, 2006)

On May 26, 2004, a grand jury in Hartford indicted Michael Ciarcia and Luiz Santiago for conspiracy to commit money laundering. Luiz Santiago pled guilty and was given a prison sentence of 33 months, to be served after completion of his 108-month sentence for trafficking in cocaine (500 g). Michael Ciarcia appeared in court, but his bid for a new trial and reversal were denied. Evidence supporting the verdict was deemed sufficient.[2]

[2] "The jury is exclusively responsible for determining witness credibility. The trial court must be careful to avoid usurping the role of the jury, and may not substitute its own determination of credibility or relative weight of the evidence for that of the jury." *See also United States v. Black*, 2002 U.S. Dist. LEXIS 4948, 2002 WL 460063, at 1 (S.D.N.Y. March 26, 2002) (citing *United States v. Autuori*, 212 F.3d 105, 114 (2d Cir. 2000)).

The court could only overturn the conviction if it deemed that "no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[3]

The primary focus of the evidence at trial was a five-week period, from November until December of 2001, in which Ciarcia made payments to Luiz Santiago by making deposits in his mother's account. Santiago's cell phone was monitored pursuant to a court-ordered wiretap. It was revealed that Santiago made 1,800 calls during a two-week period, during the hours he should have been working for Ciarcia Construction. Their relationship was found to more closely resemble that between friends than that between employer and employee. It was shown that Luiz Santiago made a living by dealing in cocaine, 17 oz of which were seized at his residence. A receipt from Galerie Lassen was also found, which the accused said was for the purchase of a painting for $4,800 in the year 2000, while the prosecution showed that the artwork was acquired for $17,500.00.

5.1.5 Galerie Furstenberg v. Coffaro, 697 F. Supp. 1282 (S.D.N.Y. 1988)

An established art gallery (*Galerie Furstenberg*) sued art dealers for violations of the Racketeer Influenced and Corrupt Organizations Act[4] and the U.S. Criminal Code.

The plaintiff, a French company, claimed to have exclusive rights to sell artworks by Salvador Felipe Jacinto Dalí, and that the contested sales were therefore of forgeries of that artist's works, whether as reproductions—printing of photographs of an authentic artwork—or engraving Dali's name on copperplate and then making the reproductions. The defendants were also accused of having issued fraudulent certificates of authenticity. The plaintiff sought compensatory damages, pre-judgment interest, and attorneys' fees.

Defendants argued that RICO requirements had not been satisfied, and that fraud had not been demonstrated.

The court granted the defendants' motion to dismiss with respect to seven of the nine claims. It denied the defendants' motion to dismiss two RICO claims.

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[3] *United States v. Walsh*, 194 F.3d 37, 51 (2d Cir. 1999).

[4] The court explained that "the RICO enterprise is defined as 'a group of persons associated together for a common purpose of engaging in a course of conduct' and 'is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.'" Citing *United States v. Turkette,* 452 U.S. 576, 583 (1981).

5.1.6 United States v. Reiss, 186 F.3d 149 (2d Cir. 1999)

Mahir Reiss appealed part of a sentence handed down by the United States District Court for the Eastern District of New York imposing a fine of $6.3 million (the maximum permitted by the U.S. Sentencing Guidelines Manual),[5] for commission of the crime of money laundering [18 U.S.C. §§ 1956(h) and 1957(a) and (b)], following a guilty plea. The decision took into account the defendant's knowledge that drug trafficking proceeds were being laundered. The district court's imposition of the maximum fine was upheld and there was no violation of the defendant's right to object to factual assertions made in the pre-sentence report before his sentencing.[6]

Mahir Reiss was considered a sophisticated businessman, but one who used Swiss bank accounts to distribute vast sums of money all over the world. Over $16 million was deposited into his accounts and more than $19 million was withdrawn between 1994 and 1997. A joint DEA-IRS investigation discovered that much of that money was the proceeds from criminal activity.

On December 22, 1997, the defendant pled guilty and was given a 27-month sentence, three years of supervised release, and forfeiture of assets amounting to some $1 million, in addition to the maximum fine ($6.3 million).

The judge calculated the penalty based on three counts of money laundering, involving a total of $3,150,000, and then doubled that amount as proceeds of crime.

Wire transfers were found to have been used for payments and bank transfers, and the setting up of negotiations by the defendant with a Colombian drug trafficker known as Orlando.

It was ruled that it was incumbent upon the accused to demonstrate inability to pay the fine assessed, which the defendant failed to do.

The appeal was denied.

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[5] Section 5E1.2(d): In determining the appropriate fine. When imposing a fine, the court must therefore consider several factors such as: (1) the need for the combined sentence to reflect the seriousness of the offense, to promote respect for the law and to provide punishment; (2) any evidence presented as to the defendant's ability to pay the fine; (3) the burden the fine places on the defendant and his dependents relative to alternative punishments; (4) any restitution or reparation the defendant has made or is obligated to make; (5) any collateral consequences of conviction, including civil obligations arising from defendant's conduct; (6) whether the defendant has previously been fined for a similar offense; (7) expected costs of incarceration and probation; and (8) any other pertinent equitable considerations.

[6] The purpose of Rule 32(c) is to ensure that the pre-sentence report (PSR) is completely accurate in every material respect, thereby protecting a defendant from being sentenced on the basis of materially untrue statements or misinformation. A defendant is provided this opportunity, and the notice requirement of departures and adjustments is therefore satisfied, as long as a defendant is adequately warned by the PSR, by the prosecution's submissions, or by the court *sua sponte*.

5.1.7 United States v. Schultz, 333 F.3d 393 (2d Cir. 2003)

Frederick Schultz appealed his conviction from the United States District Court for the Southern District of New York for theft of a work of art, its illegal interstate transportation and illegal international sale (18 U.S.C. §§ 371 and 2315—*National Stolen Property Act*). The defendant was a successful New York art dealer before being found guilty of theft of Egyptian antiquities.

The prosecution argued that the pieces belong to the Egyptian government. In 1991, the defendant met with an Englishman named Jonathan Tokeley Parry, who showed him a photograph of the head of Pharaoh Amenhotep III, claiming to have obtained it from a construction contractor. The piece was smuggled to England, disguised in plastic as a souvenir, and the defendant proceeded to act as the agent for the sale of the sculpture. To obscure these facts, Parry and Schultz invented a fictional collection, the "Thomas Alcock Collection," and told potential buyers that the piece was from that collection. The defendant attempted to make the sale to several persons and, in 1992, a buyer was found for $1.2 million. The buyer, Robin Symes, aware that the Egyptian government was searching for the sculpture, began asking the defendant questions about its origin in 1995, but received no reply. The accused and his English partner afterward brought more Egyptian pieces to New York, but experts identified one of them as a forgery.

In 1994, Tokeley Parry was arrested in the United Kingdom. A third party was also detained, in Egypt, and likewise charged with theft of antiquities. Despite all this, the defendant kept up correspondence with his English partner (Parry) and the two planned new acquisitions.

The jury found Frederick Schultz guilty, and he was sentenced to a term of 33 months' imprisonment.

On appeal, the court received three *amicus curiae* briefs. Two were filed in support of Schultz. They were from American art dealers' associations (The National Association of Dealers in Ancient, Oriental & Primitive Art, Inc.; International Association of Professional Numismatists; The Art Dealers Association of America; The Antique Tribal Art Dealers Association; The Professional Numismatists Guild; and The American Society of Appraisers) and a group of politicians, academics, and art collectors called Citizens for a Balanced Policy with Regard to the Importation of Cultural Property. They alleged that his conviction would threaten the livelihood of legitimate American collectors and sellers of antiquities operating in the arts market.

Other entities (The Archaeological Institute of America; The American Anthropological Association; The Society for American Archaeology; The Society for Historical Archaeology; and the United States Committee for the International Council on Monuments and Sites) filed a brief in support of the United States, claiming that the conviction would help protect archaeological and cultural patrimony worldwide.

Frederick Shultz called in an expert witness, Khaled Abou El Fadl, a professor of Islamic and Middle Eastern Law at the University of California, Los Angeles, who declared that the Egyptian law was ambiguous as to whether the intent was to preserve antiquities within Egypt or to assert their ownership by that country's

government. He did, however, state that he had never practiced law in Egypt, and had no license to practice here.

The court decided that the professor's testimony did not address the letter of the law (Law No. 117[7]) and considered statements by Egyptian officials supporting the legitimacy of Egypt's claim of ownership. To the court, the law was not ambiguous, but clearly affirmed that antiquities that were the subject of this conspiracy belong to that country's government. The court understood that the piece need not have been stolen in the United States to warrant criminal action.

Hence, the defendant's appeal was denied on grounds that the jury was not required to assert that he was willfully engaged in illegal behavior, but that, beyond a reasonable doubt, he knew that the works were stolen—that is, derived from crime.

The conscious avoidance doctrine was applied, and the conviction was affirmed.

5.1.8 United States v. McClain, 545 F.2d 988 (5th Cir. 1977), Rehearing Denied, 551 F.2d 52 (5th Cir. 1977); United States v. McClain, 593 F.2d 658 (5th Cir. 1979), Cert. Denied, 444 U.S. 918 (1979) (Two Convictions and Two Appeals)

This is considered a paradigm-shifting case that allowed construction of jurisprudence for the National Stolen Property Act (NSPA) of 1948 (18 U.S.C. §§ 2314–2315).

In it, the defendants were convicted of conspiring to transport and receive pre-Columbian pieces from Mexico through interstate commerce. The theory put forth was that the objects were stolen before Mexico had asserted its ownership. The interpretation was that anyone found in possession of such a piece and selling it without government permission would be considered in illegal possession or ownership, and hence required to deliver it to its rightful owner. The court understood that the word "stolen," as used in the NSPA, did not necessarily mean that the artwork was "taken without consent" but that a broad interpretation was warranted. Thus the sentence was upheld in face of a violation of the clear and legitimate Mexican ownership, pursuant to the NSPA, despite failure to show that the goods were physically and illegally taken.

It was alleged that if indeed a crime had occurred, it would only be illegal exportation, for which there was no provision in the NSPA. The court made a distinction between illegal exportation and sovereign ownership, and noted that restrictions on exportation did not imply ownership of the goods, and that whereas the assertion of ownership is an attribute of the sovereignty of the State asserting that ownership, the illegal exportation of cultural goods was considered the equivalent of theft pursuant to the NSPA.

The court thus considered that although a declaration of ownership did not per se suffice for recognition of legitimate ownership, which had to be expressed *with*

[7] For antiquities "whose ownership or possession was already established at the time th[e] law came into effect."

sufficient clarity. The court maintained that the conviction was based on the fact that the defendants were aware that they were acting in violation of U.S. and Mexican law.

5.1.9 Record No. 2007.61.81.0011245-7/SP, Conviction in 2008 by the Sixth Federal Criminal Court Specialized in Financial Crimes and Money Laundering, Upheld by the Regional Federal Appellate Court for Region 3 (São Paulo and Mato Grosso do Sul), Criminal Appeal No. 0001234-26.2007.04.03.6181/SP, Heard on 03/06/2012, Rapporteur, Federal High Court Justice Johonsom di Salvo

On August 7, 2007, Juan Carlos Ramirez Abadia, a.k.a. Chupeta, leader of the Colombian cartel *Vale Del Norte*, was arrested in the so-called "Farrapos Operation" for international drug trafficking. He, along with others, was sentenced on 03/31/2008 (ruled by the Author of this study) to a prison term of more than thirty years, five months and fourteen days and another 758 days working off fines for a number of felonies, such as money laundering,[8] using forged documents (public documents and fake identifications), racketeering and corruption, with the help of a number of co-defendants.

The Regional Federal Appellate Court for Region 3 was unanimous in its ruling on March 6, 2012. It its decision on Juan Carlos Ramirez Abadia's appeal (No. 0011245-26.2007.4.03.6181/SP), the court asserted that "no judge is bound to accept or tolerate extralegal negotiations, the Magistrate is not bound by anything defendants and the Prosecutor's Office agree to (item 6 of the supporting summary), and declarations made by a felony codefendant who, in confessing his or her role in the crime, also mentions those who cooperated as co-perpetrators and sets forth the way in which such persons assisted in the crime, are admissible evidence (item 18 of the summary). Forfeiture of property was upheld on the understanding that in money laundering, the *lex specialis* allows reversing the burden of proof with regard to goods apprehended as material objects in laundering, as is expressly set forth in Article 4 of Law 9613/98, itself flowing from Article 5, item 7 of the Vienna Convention, and constitutionally in accord with due process, inasmuch as Article 156 of the Code of Criminal Procedure places the burden of proof on the defendant for allegations he makes (item 22 of the summary).

There was a seizure on 07/18/2008, and forfeiture of real and chattel property, including artworks appraised at more than US$3,800,000 that were being held outside Brazil by the organizations/family of the suspect for possible sale to raise financial resources (record of Police Investigation No. 2008.61.81.001248-0).

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[8] The conclusion drawn was that the Colombian defendant had taken legal and illegal money (from international drug trafficking) into Brazil, and made use of third parties to keep considerable holdings in the country outside the reach of competent authorities.

The artworks located in Brazil had already been sent to museums in São Paulo. However, for those located abroad, it was not possible to recover them because Colombia and the United States, where they were located, required specific location information to be able to honor Brazil's request. INTERPOL was then formally contacted.

Although at the time there was not sufficient information in hand to identify the location of the artworks, there was specific data on each piece. It was also revealed that a cousin of the trafficker was in charge of the artworks, and that she had visited him on several occasions in Brazil, at the federal prison, beginning early in 2008.

5.1.10 Criminal Action No. 2003.71.00.054398-0 Filed at the Third Federal Criminal Court, Porto Alegre (State of Rio Grande do Sul)

Rio Grande do Sul state tax inspectors intercepted a truck, belonging to a company specializing in international transportation of art objects, containing 210 pieces, including some dating from the seventeenth, eighteenth and nineteenth centuries. Several persons were charged with smuggling or larceny.

The event resulted in an indictment charging attempted smuggling, for the material was en route to Santana do Livramento, on the border with Uruguay, where it was presumed that the goods would be taken for export to Montevideo.

One of those named in the complaint made a plea bargain in exchange for a halt to the proceedings. The artworks were placed in the custody of the person so named. At the Regional Federal Court for Region Four (including the states of Paraná, Santa Catarina and Rio Grande do Sul) a writ of *habeas corpus* was filed (No. 2006.04.00.004416-9/RS[9]) and was denied.

[9] HABEAS CORPUS. BAR TO A CRIMINAL ACTION. IMPOSSIBILITY OF EXAMINING THE SET OF ALL PROBATIVE EVIDENCE. ATTEMPTED SMUGGLING. 17TH, 18TH AND 19TH-CENTURY PIECES OF SACRED ART. SEIZURE. RELEVANCE OF CONSTITUTIONALLY PROTECTED GOODS (ARTICLE 216, SUBSECTION III, BRAZILIAN FEDERAL CONSTITUTION). 1. The Constitutional remedy intended to safeguard the individual's freedom to come and go, pursuant to Article 5, LXVIII, is not the best approach for investigation of questions that demand the production of extensive bodies of proof. 2. The goods apprehended may be considered, in whole or in part, scientific and artistic creations, and are for that reason protected under Article 216, subsection III of the Federal Constitution, and in addition, under protection pursuant to Law 4845/65, prohibiting the removal from Brazil of art objects produced through the close of the Monarchic Era—or even foreign works depicting Brazilian personages (Article 5). 3. Impossibility of barring criminal action in view of the strong indications of attempted smuggling, without explanation and proof of how the objects were acquired, the destination being a border town, no truth having been found to the defense's claim involving the use of the objects to adorn a stage for the exhibition of horses. 4. Order denied (TRF4ªR, HC 2006.04.00.004416-9, Seventh Panel, Rapporteur for the Ruling, Salise Monteiro Sanchotene, gazetted on 05/10/2006).

5.1.11 Public Action Civil Suit in Court of Environmental, Agrarian and Waste Proceedings of Porto Alegre, Rio Grande Do Sul (No. 2006.71.00.014365-6/RS/0014365-43.2006.404.7100)

This public action civil suit was heard, by reason of the facts described in item IV.1.10, by the Office of the Federal Prosecutor against Piero Maria Ortolani (one of the defendants in the criminal action), the National Cultural and Artistic Heritage Institute (IPHAN) and the Federal Government, with discussion turning to the preservation of national historic and cultural heritage by obtaining a court order to ensure the seizure and proper redirection of artworks and antiquities dating from the seventeenth, eighteenth and nineteenth, which were involved in an attempt at illegal diversion into Uruguay by the defendant, while classified as goods barred from leaving Brazilian territory (Laws 3924/1961[10] and 4845/1965[11]).

The case was examined from the standpoint of Anticipatory Relief on 05/22/2006 (Gazetted on 05/23/2006) and the court granted the petition. Also included were the filings of appeals and rebuttals. The case was turned over to the Regional Federal Court for Region Four for conversion to digital media, and then returned to the lower court. There is at this time no record of submission to the appeals court.[12]

In the initial petition, the Office of the Public Prosecutor alleged that defendant Piero produced neither documentation nor proper transportation for artworks and antiquities barred from leaving Brazil, and identified himself as the owner of the goods apprehended and likewise as the person to whom the works were restored by a decision handed down in ongoing criminal proceedings at the Third Federal Court of Porto Alegre (file 2004.71.00.021304-2). It further alleged that

[10] Article 20. No object of archaeological, prehistoric, numismatic or artistic interest may be transferred abroad without obtaining an express license for the purpose from Brazil's National Historic and Artistic Patrimony Directorate, entered onto a clearance form in which all objects to be transferred are duly listed. Article 21. Failure to observe the requirements of the preceding article shall result in summary seizure of the object to be transferred, without prejudice to other legal action to which the responsible party may be subject. Sole paragraph. The object seized, itself the reason for this article, shall be delivered up to the National Historic and Artistic Patrimony Directorate.

[11] Article 2. Likewise prohibited from leaving Brazil are artworks of the same type originating in Portugal and incorporated into Brazil's national milieu during the Colonial and Imperial regimes; Article 3. Likewise barred from leaving Brazil are paintings, sculptures and graphic artworks which, although produced overseas during the periods mentioned in the preceding articles, are depictions of Brazilian personalities or otherwise related to the history of Brazil, including Brazilian landscapes and customs; Article 5. Should exportation of any of the works and projects to which this Law applies be attempted, the said works or projects shall be seized by the Federal Government or the State in which found on behalf of their respective museums.

[12] Information retrieved from the website of the Regional Federal Court for Region 4. www.trf4.jus.br. Accessed June 5, 2012.

the National Cultural and Artistic Heritage Institute should have taken all proper measures to inventory and recover the works apprehended in its capacity as a government agency empowered to act on behalf of Brazil's historic and cultural patrimony. It further argued that the Federal Government has a mandate to provide the means and resources necessary to enable IPHAN to carry out its assigned job of preservation and protection of national cultural patrimony. It asserted that in the record of Criminal Proceedings No. 2003.71.00.054398-0, filed at the Third Criminal Court of Porto Alegre, it was shown that on 08/27/2003, a moving van was intercepted containing as cargo 210 art objects, among them antiquities barred from leaving Brazil, without legal documentation to show origin and including features that did not match the declarations on the bill of lading for highway transportation as cargo. The prosecution alleged that during the course of investigations, IPHAN analyzed the pieces and concluded that among the seized holdings were 129 pieces of sacred art and pieces dating from the seventeenth, eighteenth and nineteenth centuries. It was admitted that the merchandise was worth a considerable amount on the market, as discovered by the Revenue Office, Department of Public Revenues for the State of Rio Grande do Sul, totaling R$674,561 (US$377,000). The goods were en route to Uruguay, in violation of Brazilian law barring them from leaving the country (Law 4845/1965), it having become evident in the criminal action that there was an attempt to ship the goods abroad, from the way they were packed, from the declarations filed by the owner (that the goods were part of an inheritance of one of the sons of defendant Piero Maria Ortolani residing in Uruguay), from the fact that the address entered was that of a vacant building, and because the company transporting the goods itself specialized in international transportation of art objects. Taken into account was the likelihood that the goods would have ended up in Uruguay if not removed from the possession of defendant Piero. For these reasons, the Office of the Federal Prosecutor found it advisable and necessary to file the Public Action Civil Suit so that proper administrative actions would be taken to ensure the integrity and restoration of the goods to Brazil's cultural patrimony. The petition was for Anticipatory Relief to prevent damage to Brazil's cultural heritage, citing: "(a) the mandate given the National Cultural and Artistic Heritage Institute (IPHAN) to make use of its administrative police powers to take all necessary steps to ensure the protection and recovery of cultural assets listed on the Inspection Report prepared by the Institute on September 11, 2003 (Article 216, § 1, of the Brazilian Federal Constitution, Article 5 of Law 4845/65, Articles 2, 13 b and d, and 14 of Ministerial Decree 72312/73, and Articles 14 and 15 of IPHAN Finding No. 262-92); (b) following recovery of the cultural goods, stock-taking and temporary relocation in a public museum pending conclusion of proceedings now underway (Law 4845/65 and IPHAN Finding No. 262/92); (c) filing of administrative proceedings by IPHAN for a decision on the situation involving the goods subject of the present Public Civil Action Suit and identification of their origins (Article 216, § 4, of the Brazilian Federal Constitution, Article 8 of Ministerial Decree 72312/73, Article 15 of IPHAN Finding No. 262/92); (d) the Federal Government's determination to provide all means and resources necessary to the

enforcement of items (a) and (b); (e) assessment of a daily fine in the amount of one thousand reals (R$1000.00) for violation of the anticipatory injunction, and did not rule out the imposition of civil and criminal sanctions upon those who gave cause for same. It requested a provenance action for: c) forfeiture of all goods listed on the attachment and in possession of defendant, by reason of attempted smuggling, and, alternatively: c-1) restoring them back to from whence they came (once discovered by IPHAN in administrative proceedings); c-2) if the origin of the said goods cannot be identified, administrative measures to ensure their integrity and return to Brazil's cultural patrimony by prominently entrusting the pieces to national museums (Article 5 of Law 4845/65); (d) that the Federal Government be ordered to provide all necessary means and resources so that IPHAN may proceed with the recovery, inventorying and restoration of those goods to Brazil's cultural patrimony, by properly entrusting them to museums (Decree 72312/73 and Law 4845/65); and (e) imposition of a daily fine in the amount of one thousand reals (R$1000) for failure to comply."

In the decision, the court found that the facts had been sufficiently proven and discussed in the criminal action, from the record of which a sufficient number of pieces of evidence was produced, in light of cross-examination, to provide convincing evidence of the facts of the case. A moving van was stopped and apprehended at the state inland revenue station in Guaíba in 2003, and was found to be carrying an enormous quantity of historical works and pieces, which received news coverage at the time. Once pertinent criminal investigations were made, the court's sentence mentioned the search and technical forensics reports by IPHAN, which explained the historical value of many of the items seized. A police investigation report was also prepared, narrating all investigations made and culminating in the framing of a complaint against those identified by the Federal Prosecutor's Office as responsible for commission of a crime per Article 334, heading, of the Criminal Code.

Following the decision of the Third Criminal Court for Porto Alegre ordering the return of the seized items to defendant Piero Maria Ortolani, discussion continued in all other jurisdictions involved—civil, administrative and fiscal. The criminal court decision included those reservations, and limited itself to acknowledging the issues (pertinent to the restitution of items seized) within the scope of its own criminal jurisdiction. Hence, it was decided that "In view of the foregoing, I GRANT, IN PART, THE PETITION FOR RESTITUTION, to order the delivering up of the objects seized in record of Police Investigation No. 2003.71.00.054398-0 to petitioner PIERO MARIA ORTOLANI, under bailment, the said goods to remain in Brazil until a further decision by this Court, without prejudice to the maintenance in custody of the items seized by state and federal tax authorities."

The court concluded that the criminal court decision on provisional restitution of the goods seized in the police investigation (and the subsequent criminal action) is limited to the implications of that seizure to the criminal proceedings, as that court's own decision recognizes with reservations, so that neither IPHAN nor the civil courts were impeded from looking into questions relating to the administrative infraction in those proceedings, if committed by defendant Piero Maria Ortolani, and discussed in this Public Action Civil Suit.

Other information recognized the historic value of many of the objects seized, as shown by the record of search and forensic report, both conducted by IPHAN, in which the goods were described in detail, with the latter report concluding that "the pieces comprising this collection, dating from the seventeenth, eighteenth and nineteenth centuries identified in bill of goods 1, may not leave the country without prior authorization from IPHAN, pursuant to Law No. 4845 of 11/19/1965."

The special protection extended to cultural objects does not restrict itself to a ban on removal from the country, but is backed by court-ordered seizure, apprehension and redirection to Brazilian museums in the event of any attempt to export such objects from Brazil. The action taken by IPHAN was, however, held to be contrary to this, in that it awaited the conclusion of criminal action to only then take the steps that already lay within its authority, stating: "this upon our stated view that it is inadmissible that IPHAN take any action while the question is still being contested in court, which it is at this time."

Anticipatory Injunctive Relief was thus partially granted: "(I) Order respondent IPHAN to take all necessary steps to complete the inventory of all pieces and objects described, and to conclude such taking of stock within 90 days, and show compliance in the record; (II) Order that defendant Piero Maria Ortolani remain as bailee of the said goods through a bailment agreement to be entered into before this Federal Court (within 15 days following citation in this Public Civil Action Suit), with this bailee being required to inform this Court (within 15 days following citation in this Public Civil Action Suit) of the exact location of the said goods within Brazilian territory, and agreeing further to neither transport nor remove the goods from their indicated location without prior, express authorization from this Court, and further agreeing to neither remove nor attempt to remove the said goods from Brazil's national territory, and further agreeing to deliver up to the agency or authority having jurisdiction the said goods if so required by court order in this Public Civil Action Suit, or in other administrative or judicial proceedings; (III) Order that in the event that defendant Piero Maria Ortolani does not wish to act as bailee for the aforesaid goods, or does not comply with the order set forth in the preceding item (within 15 days following citation), that in such case respondent IPHAN shall do all that is necessary to recover and place the goods in question in a public museum, where they will remain, provisionally, until a final decision on the Public Action Civil Suit, thereby ensuring compliance with the provisions contained in Law 4845/1965, as well as the efficacy of orders emanating from the Public Action Civil Suit. It then required that administrative measures be adopted and shown on the record by respondent IPHAN within 30 days beginning the date of citation to so act." In addition, the injunctive relief ordered the Federal Government, a respondent, to provide and make available all means and resources necessary for respondent IPHAN to comply with the entire content of the court order.

This decision was handed down on 11/22/2010, and gazetted 11/24/2010. It held: "I reject the preliminary motion by the Federal Government and, on merits, rule in favor of this Public Civil Action Suit to: (a) Declare that defendant Piero Maria Ortolani did violate the provisions of Law 4845/65; (b) Sentence respondent

Piero Maria Ortolani to the penalty provided in Article 5 of Law 4845/65, namely permanent forfeiture of all goods apprehended and discussed in this Public Civil Action Suit, and name as beneficiary the National Museum of Fine Arts and IPHAN; (c) Order defendant Piero Maria Ortolani to deliver up to IPHAN within 30 days (following service of this decision) all goods apprehended and discussed in this Public Civil Action Suit (once this decision becomes final) to the National Museum of Fine Arts; (d) Order the Federal Government to provide all means and resources necessary in order that IPHAN may proceed to receive, recover, take stock of and restore the goods apprehended and discussed in this action to Brazil's cultural patrimony, in order to secure its proper allocation to the National Museum of Fine Arts as beneficiary; (e) Order the National Historical and Artistic Heritage Institute (IPHAN) to make use of its administrative police powers to take all necessary steps for the protection and recovery of the cultural goods apprehended and discussed in this Public Civil Action Suit, including their reception or recovery (within no more than 30 days following service of this decision) and taking all necessary steps to receive, recover and properly allocate (once the decision becomes final) all goods apprehended and discussed in this action, and to show such compliance on the record in 60 days (beginning the date of service of notice of this decision) showing all of the steps taken for immediate compliance with this order (delivery and receiving of goods), and also to show all of the steps taken following the finalization of this order (within no more than 60 days following notice that the order has become final); (f) Order the National Historical and Artistic Heritage Institute (IPHAN) to, following recovery of the goods named in this action, take inventory and see to the subsequent definitive delivery of all of these goods to the National Museum of Fine Arts; (g) Determine and establish a daily fine for failure to comply with the order of anticipatory relief, while current, and of this decision, of R$1,000.00, as set forth in the basis documents; (h) Order defendants to pay all court costs, as set forth in the basis documents."

5.1.12 Criminal Action No. 2004.61.81.008954-9 (Involving What was Banco Santos) Tried Before the Sixth Federal Criminal Court Specialized in Money Laundering and Financial Crimes, on Appeal Before the Regional Federal Appellate Court for Region 3 (São Paulo and Mato Grosso do Sul)

The case is still under appeal, but featured the seizure of works of art, their forfeiture and cooperation between the governments of Brazil and the United States in repatriating several of them back to Brazil.

Defendant Edemar Cid Ferreira was found guilty in December 2006 and sentenced to 21 years in prison and payment of the equivalent of 73 days in fines

(a total of 7,980 minimum monthly wages, which is some R$5,187,000 or US$2,594,000), for racketeering, fraudulent management of a financial institution (Banco Santos), exchange quota violations and money laundering. His wife and others were also convicted and given harsh terms in the lower court.

Their assets were confiscated (cash, computers, real estate, wine and works of art). The works of art were turned over to cultural entities (Museum of Archaeology and Ethnology at the University of São Paulo, the Paulista Museum or *Museu do Ipiranga*, the Museum of Contemporary Art at the University of São Paulo, Institute of Brazilian Studies Sacred Art Museum, the Latin America Memorial Foundation, the Navy Cultural Center in São Paulo, and the Secretariat of Culture for the State of São Paulo), to be permanently incorporated into their holdings—usually considered the beginning of the process of being declared a treasure by the São Paulo City Council for the Preservation of Historical, Cultural and Environmental Patrimony (CONPRESP).

The artworks consisted of framed art, photographs, archaeology, ethnography, sculptures, Brazilian regional literature and antiquities by renowned artists going back to the fourteenth to ninth century B.C. (Togatus Romanus) and even contemporary pieces (Basquiat, Hirst, etc.), totaling over 12,000 pieces.

The decision was made to turn the defendant's home (Rua Gália 120, borough of Morumbi), furniture and all artworks within it over to the State Secretariat of Culture as they were deemed cultural goods subject to state protection.

Artworks that had been shipped abroad were also decreed a forfeiture, and INTERPOL was formally notified, making possible the repatriation of some of the works through diligent efforts by U.S. authorities.

The understanding set forth in the decision written by the author of this study is that a work of art, whether a sculpture, painting, photograph, etc., ought not belong to any person or even to a given location, for here one is dealing with an asset of all humankind. To properly deal with this issue rather than become embroiled in economic discussions, we rely entirely upon the Convention Concerning the Protection of the World Cultural and Natural Heritage passed by the General Conference of the UN Educational, Scientific and Cultural Organization (UNESCO) held 11/16/1972, stating that works by men as well as notable places are considered cultural patrimony, and therefore protected by the Convention (Article 1), and that it is the duty of States to protect, preserve and present them for future generations (Article 4) and give them a function in the life of the community (Article 5). This was incorporated into Article 23, Subsections III and IV of Brazil's Federal Constitution, which charges the various branches of government with the protection of historic, artistic and cultural goods, so as to prevent their deterioration, and is also written into legislation under the Constitution (e.g., Legislative Decree No. 25 of 11/30/1937 in its Articles 1 and 24).

No such treatment would apply to any other goods apprehended, seized or libeled in criminal prosecution, other than works of art.

In the decision rendered, mindful of the valuation of culture and its diffusion to poorer boroughs surrounding big city centers, in confidential records of

Cooperative Debriefing, the Sixth Federal Criminal Court for São Paulo decided to turn over 1/15 of the amount as voluntary payment to culture, thus:

Pursuant to the decision uttered in these records, on this date, I FIND:

This court has allocated sums obtained as voluntary indemnity in Plea Bargaining directly to charitable entities, duly listed with the court, and required to render accounts. This has been the established rule to preclude diversion of resources while obtaining a prompt, effective and useful result from Criminal Law, provided, of course, that the accused are in fact willing to disclose the facts and circumstances in all of their magnitude, and thereby fully comply with the requirements of law.

It would be sad for a nation's government not to see in CULTURE a source of knowledge and meaning: INTELLECTUAL STIMULATION no less important. Our country possesses artists of capacity and renown, among them, Vik Muniz, Gustavo Rosa, Takashi Fukushima, Romero Brito, Tarsila do Amaral, Aldhemir Martins, Cândido Portinari, Galileo Emendabili, and Alfredo Volpi, more on account of their determination to make use of innate talent than of any government incentive.

Yet it is not uncommon to receive reports of artists who lack the necessary resources to meet the costs of producing a work of art which, albeit important, is not duly recognized.

Artistic activity ought not be burdened by lack of sponsorship, the more so if it is a valuable piece of work, oftentimes recognized only abroad.

Society's concern for CULTURE, so evidently in short supply, makes this decision more than a mere gesture of institutional support. To support and believe in humanity, and full expression, is recognition indispensable to the benefits CULTURE has to offer: it evokes a sentiment in people, notably a feeling of reflection and pleasure, or sometimes one of conciliation and generosity.

One could not, on this historic date, fail to mention the UN Universal Declaration of Human Rights of 1948, which declares the following:

Article XXVI:

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations and racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

Article XXVII:

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

Furthermore, Brazil, as a signatory to the 11/16/1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (promulgated by Ministerial Decree No. 80978 of 12/12/1977), is bound to "protect, preserve and present to future generations" cultural patrimony, including "works of man" (Articles 1 and 4). It should also give them, again, pursuant to the aforesaid Convention, "a function in the life of the community" (Article 5).

It would therefore appear that this court, by the values it espouses, could take no other course than EXCEPTIONALLY find as it has and simply cannot let such an important opportunity pass.

The presentation of an artwork that is exceptional in its magnitude and beauty, would allow all manner of persons to appreciate the beauty of it and to enjoy, albeit only fleetingly, a gratuitous moment of happiness.

It would make no sense, especially given our overriding pedagogic and cultural function, to fail to recognize, even if symbolically, in this decision the manifest public interest, likewise expressed in legislation on the subject. The decision is therefore justified, even given the realization that this is no everyday event.

Criminal Justice must exist for perpetuation of an essential Power: that of judging well, cautiously and prudently all of the questions placed before it. Nor could it shy away from making a decision, even if unprecedented. Our preoccupation ought not limit itself, pending better judgment, solely to the application of Criminal Law in its purest sense. It ought also to make of it, if possible, the best for society, without, clearly, straying from its original purpose.

Article 23 of Brazil's Federal Constitution, in its Subsections III and IV sets forth the responsibility of all Branches of Republican Government to protect artistic goods, to the point of stopping their deterioration, which itself denotes understanding on the part of the constitutional legislator of the inescapable duty to protect and present works of art because they constitute an extremely important social value.

Legislative Decree No. 25 of 11/30/1937, duly received by the Constitution, provides in its Article 1 the duty of Government to provide opportunities for access to and dissemination of CULTURE.

It is incumbent upon the State Secretariat of Culture – with the assistance of the City of São Paulo, the district enfolding the criminal liability – to make such allocation as best serves the spirit of this decision which is, I repeat, an attempt to lend weight and substance to essential constitutional values. By way of example, we have as one of the fundamental purposes of the Federative Republic of Brazil, that of "ensuring national development" (Article 3, Subsection II, Federal Constitution), which encompasses all knowledge had by people in all fields: awareness of their own existence. This is to say, knowledge acquired directly, with no intermediaries, bringing about a pure reaction or interpretation from each and every one (collective right to public access, yet also individual, both subjective, to freely appreciate and express).

One may not favor this or that artist, or reward some laudable stance. This is about reaffirming a value very dear to humanity and to our society, yet so distant from the ordinary citizen.

In view of the foregoing, and pursuant to the Universal Declaration of Human Rights, to the Federal Constitution, to the aforesaid UNESCO Convention, and to that body of laws determining that all of humanity, from its humblest member, shall have substantive access to CULTURE, I find as follows:

a) Allocation of one hundred thousand reals (R$100,000.00), that is, 1/15 of the total received or receivable, to the Government of the State of São Paulo, which shall contact the City of São Paulo, the district enfolding the criminal liability, for its use to benefit CULTURE, notably its true purpose: to recover artworks or hold cultural expositions or provide direct access of the same to needy populations, said use being AT ITS DISCRETION targeted to that end and NEVER to intermediate activities. If understood to be necessary it may, LIKEWISE at its discretion, suggest allocating such funds or part of such funds to one or more nongovernment organizations of an exclusively cultural nature, whose purpose is to put on programs for the cultural development of low income populations, it being incumbent upon them to use the funding for the purpose set forth above. The Secretariat shall notify the court in advance of the decision;
b) I also order, however, that after the decision by the State body, in cooperation with the municipality, to be given within 60 days, that a RENDERING OF ACCOUNTS be placed before this court within 30 days of all resources received by the State Secretariat of Culture;

c) One of the defendants shall set up a specific checking account, provided with the amounts established, and provide documentary proof of the fact in court within 24 h;
d) Defendants may not interfere in the decision-making by the State Government, and must comply in full once they are informed of the purpose of the funding, and must make all necessary bank transfers.

It is hereby ordered:
That notice of this decision shall be served on the State Secretariat of Culture and on the Municipal Secretariat of CULTURE for the city of São Paulo.
Serve notice to the Office of the Federal Prosecutor.
Serve all parties notice of this finding, which shall be part of today's decision.
São Paulo, December 10, 2008.
(60th anniversary of the Universal Declaration)
FAUSTO MARTIN DE SANCTIS
Federal Judge

The Second Section of the Appellate Court in Conflicts of Jurisdiction Nos. 76740/SP (record No. 2006/0280806-2, Questioner being the Office of the Public Prosecutor for the State of São Paulo) and 76861/SP (2006/0279583-9, Questioner being the No. 2 Court of Bankruptcy and Recovery for São Paulo), where the jurisdiction is, in both cases, the Sixth Federal Criminal Court, held on 05/13/2009, through Minister and Rapporteur Massami Uyeda, that the No. 2 Court of Bankruptcy and Recovery of the County of São Paulo ought to see to the recovery of the apprehended artworks, but only after the sentence handed down by the Federal Court becomes final, at which time forfeiture would be completed and it would fall to the bankruptcy judge to decide who are good-faith third parties.[13]

The imputation claimed that the accused had violated Article 1, Subsections VI and VII of Law No. 9613/1998, and also its Para 4, in addition to Law No. 9034/1995, for having agreed in advance, for a common purpose, to disguise the origin and ownership of the proceeds of crime as typified in Brazil's White-Collar Crime Law (No. 9492 of June 16, 1986), by resorting to several mechanisms including conversion of part of the sums involved into legal assets.

The managers of *Banco Santos S.A.* took pains to give the necessary appearance of legitimacy to their criminal acts, even though, in compliance with the rules of the Central Bank, they did organize a department for the prevention of money laundering, which was itself unable to detect suspicious transactions by the directors of that very institution.

It was found that money from the financial management of *Banco Santos S.A.*, sometimes from operations in Brazil, other times from operations abroad, returning afterward to Brazil, was used to benefit managers and directors (who received large bonuses from affiliated companies *Alpha* and *Maremar*), when not from their own customers, and primarily from defendant Edemar Cid Ferreira and his family members, sometimes through persons from outside of his family environment. The diverted money was used for several different purposes: maintenance of cash

[13] Similar in outcome was the holding in the Amendment of Judgment in Conflict of Jurisdiction No. 76861/SP, on 12/07/2009, that the civil loss shall only produce legal effect once the decision of the Federal Court has become final.

flow for *Banco Santos S.A.* and its nonfinancial companies listed on its organizational chart, payment of bonuses to directors and employees, and investment in real estate and works of art. Finally, sums obtained through the commission of antecedent crimes were brought back into the formal economy with no connection to their shady origins.

Brazilian companies, whose partners are offshore companies, were provided with large sums brought into Brazil, in part through exchange contracts recorded at the Central Bank under the heading of foreign investments by partners, clothing them with legitimacy which, however, gave way before the discovery that these companies were credited abroad with money deriving from crimes committed in Brazil.

There was considerable resistance to the obtaining of vital information from tax havens, and the issue was resolved with the valuable cooperation of U.S. authorities who sent Brazil a considerable amount of important banking information that made it possible to access and check the names of those responsible for offshore companies operating bank accounts in the United States.

The unlawful acts could only be carried out, in theory, thanks to the efficient and comfortably large holdings of its controller who, oddly enough, owned practically nothing in his own name (no vehicles, no artworks, just two lots and an apartment in Pompéia in São Paulo).

For this there was good reason. The evidence produced showed that the holdings of Edemar Cid Ferreira and his wife, Márcia de Maria Costa Cid Ferreira, had no legal foundation. The property owned by the couple was always involved in events related to the diversion of money from *Banco Santos S.A.*

Indeed, as of their entering into the bonds of matrimony, in anticipation of events, they decided to harden their assets—actual preparation for the crimes they had decided to commit.

Márcia revealed that her husband had decided to keep his property separate in order to protect her from the ups and downs of his business activities, and also because, should bankruptcy occur, the couple's children could keep money having to do with the Bank. When questioned as to whether the cash spent in constructing the home at Rua Gália 120 might have come from her husband's activities at *Banco Santos S.A.*, she was emphatic: "Of course. On account of the profits he had at the bank, right? All of it, I believe."

She asserted that she was included among management personnel at several companies at the request of her husband, who saw to it in order to protect her. This strategy, in the words of the accused, was certainly in his interest while seeking to engage in the laundering of money. With each of the couple's new acquisitions, Edemar signed the property over to her, with the exception of the bank and the brokerage house.

Dissimulation as to the origin and ownership of sums used for the purposes named and the deception of Brazilian authorities became discernible on account of systematically repeated organization of companies and amendment of articles of association, most notably in tax havens.

On its organizational chart, *Banco Santos S.A.* was subdivided into several committees, each managing a given area. The credit area was called upon to

approve Proposed Credit Operations (POCs) for the officers—the account managers working on the business platforms. In addition to this committee, there was an informal committee consisting of Edemar Cid Ferreira, Mário Arcangelo Martinelli, Álvaro Zucheli Cabral, Ricardo Ferreira de Souza e Silva and Rodrigo Rodrigues de Cid Ferreira.

Acting as planned then, toward a common purpose, they dissimulated the origin and ownership of the proceeds of crimes committed against the National Financial System by the criminal organization using, among other mechanisms, conversion of part of the money into legal assets.

It became clear that the controller, with the avid cooperation of others, acquired assets thanks to the commission of financial felonies by a criminal organization which garnered him a large sum of money, and real estate—especially the house at 120 Rua Gália, a veritable work of art[14]—in addition to thousands of other works of art composing one of the largest, if not *the* largest collection in Brazil, which, sadly, was the result of unlawful activity.

It was recognized that the crime characterized in the Money-Laundering Law (Article 1) involves fraud in every case, whether direct fraud in the first degree, direct fraud in the second degree (necessary results) or occasional fraud: where there was knowledge or reason to know that the goods were the proceeds of criminal behavior (Article 1, heading and § 2, Subsection I), there being no need to know precisely the particular behavior, nor to have precise knowledge that criminal activity was involved, rendering the subject liable to charges, or requiring knowledge of criminal wrongdoing, it being sufficient that a typical illegal act was committed (proceeds, or presumed proceeds, probably of occasional fraud from some antecedent crime). It does not require knowledge of the perpetrator of the antecedent crime, the circumstances of its commission, nor a personal link between perpetrators. The knowledge must exist at the time the typical act is carried out, and the so-called *dolo subsequens*, that which appears after the fact, carries no criminal import, except that the felony in every case involves *concealment* and *dissimulation*.

Many of the defendants engaged in criminal conduct, and abetted the conduct of the others—whether because they wanted to be fully trusted by their employer, or to ensure the continuity of their jobs, or to guarantee their regular and supplementary incomes or even, finally, for the illegal enrichment of Edemar Cid Ferreira.

With that, Miscellaneous Criminal Proceeding No. 2005.61.81.900396-6 was begun at the behest of the Office of the Federal Prosecutor, and the decision handed down on 02/18/2005, the basis of which was that the acquisition of assets by Edemar Cid Ferreira that had presumably been accomplished using money of illegal origin arising from crimes against the National Financial System and from money laundering. Orders were issued for seizure of real property located at Rua Gália, No. 120, Jardim Everest, Morumbi, in São Paulo; likewise, the seizure of

[14] The house cost approximately R$143,000,000 (US$72 million) to build in August 2004.

all art and decorative objects at the headquarters of *Banco Santos S.A.* and at the storage facility (technical reserve of *Cid Ferreira Collection Empreendimentos Artísticos Ltda.*).

The court order also extended to artworks not found at the defendant's residence, nor in museums and institutions in São Paulo, the district in which criminal liability was imputed (Contemporary Art Museum, the Paulista Museum, the Institute of Brazilian Studies, the Museum of Archaeology and Ethnology, the Sacred Art Museum, the Latin America Memorial Foundation, the Navy Cultural Center in São Paulo and the São Paulo State Secretariat of Culture), all of which received a number of works under bailment, once matched against the files for the *Cid Ferreira Collection Empreendimentos Artísticos Ltda.* (apprehended database) and direct examination of the controller.

A letter was sent to the Asset Recovery and International Legal Cooperation Council Department (DRCI), itself tied to the Justice Ministry, requesting that all necessary measures be taken for the seizure and repatriation of artworks not yet located, and forwarding the new list (based on information obtained by the Court Clerk from the defendant), all centering initially on the defendant's activities in the U.S. and Switzerland. INTERPOL was called in and asserted it had listed the works of art with the worldwide database available on its public domain website, and also published the list in *INTERPOL Stolen Works of Art*.

As a result of a decision handed down on 08/30/2005, the Brazilian archaeological pieces were added to the permanent holdings of the University of São Paulo Museum of Archaeology and Ethnology (MAE/USP), the acquisition of which pieces by the accused was unconstitutional because no such goods, belonging as they did to the Federal Government, could be left in the possession of any private parties. This is because the Brazilian Constitution establishes, in its Article 20, Subsection X, that all archaeological and prehistoric sites belong to the Union, and in Article 23, Subsections III and IV, that all Governing Bodies (the Union, States, Federal District and Municipalities) shall be responsible for the protection of documents, works and other items of historical, artistic or cultural value, and archaeological sites, and also "prevent the loss, destruction, or changing of the characteristics of works of art and other goods of historical, artistic and cultural value."

To conclude that the items were the property of the Federal Government, based on examinations already conducted, pertinent legislation regulating the matter was examined showing no such things could be acquired by private parties, and that further, their entry into Brazil was accomplished under the aegis of the Federal Constitution of 1988.

Despite the decision of the Superior Court of Justice, the goods ordered forfeited could not be taken to Bankruptcy Court, for once the decision became final, those assets would be restored to the Federal Government and not to the creditors of the bankrupt *Banco Santos S.A*. The court having jurisdiction was not the Bankruptcy Court, but rather the federal criminal court, for the seizures arose as a result of decisions handed down in the criminal court, long before bankruptcy was declared on 09/20/2005.

Hence, the petition for seizure of assets formulated by the Office of the Federal Prosecutor was dated 02/10/2005, and the corresponding decision affecting nearly all of the goods sequestered was made on 03/01/2005. Creditors of the bankrupt *Banco Santos S.A.* could not be regarded as injured parties or good-faith outside parties under the terms of the aforesaid Article 91, Subsection II of the Criminal Code, for the seizure was of goods belonging to companies (*Atalanta Participações e Propriedades S.A.*, *Hyles Participações e Empreendimentos Ltda.*, *Cid Ferreira Collection Empreendimentos Artísticos Ltda.* and *Brasilconnects Cultura*) that had not yet been declared bankrupt, which only occurred afterward as a consequence of the decision of the Federal Court which did not affect stakeholders in the bankruptcy.

The issuance of that decision served to confirm that the acquisition did indeed flow from criminal conduct against the National Financial System and money laundering, thereby assuring its forfeiture to the Federal Government. Both the chattel and the real property had been acquired in the names of third parties, by companies nominally headed up by the wife of the controller and other defendants to dissimulate the source of money therein invested—much of it diverted by means of illegal acts committed in the management of *Banco Santos S.A.*

Creditors were only entitled to satisfaction from assets obtained legally by *Banco Santos S.A.* Now, since the acquisition was shown in federal criminal court to have been irregular, and what was sought was restitution to the Federal Government (and not reimbursement), the bankrupt estate could not possibly have holdings there; otherwise, the entire criminal law system would be turned on its head, along with international Conventions (the Palermo and Vienna Conventions come to mind) and FATF Recommendation No. 3, indicating the necessity of forfeiture upon conviction—not as a means of indemnifying creditors, but rather to provide restitution to the injured party, which in this case is the Government.

This is not a case of future reimbursement of losses to the Government, for the Government is not a creditor of the bankrupt estate. The issue in this case is ownership of things the government is entitled to, and this is affirmed on account of the defendants' convictions. Hence, the legal nature of the Government's claims lie completely outside the jurisdiction of Bankruptcy Court, where creditors are desirous of reimbursement for losses they have suffered on account of unlawful activities. In Federal Court, judgment of merits turned up only liability for crimes imputed, which, in this case, upon conviction, would affect ownership of goods acquired using the proceeds of crime.

For this, we cite Bankruptcy, Judicial and Extrajudicial Recovery Law No. 11101 of 02/09/2005, Articles 85–93, requiring the restitution of assets that do not belong to the debtor or the bankrupt, which is precisely what was found in the case in point, and it makes it clear that this is a legal situation quite apart from claims by creditors. The old Bankruptcy Law contained similar provisions (Legislative Decree No. 7661 of 06/21/1945, Articles 76–79).

From another standpoint, Bankruptcy Court proceedings should involve all actions relating to the assets, interests and dealings of the bankrupt estate, pursuant

to Article 76 of Law No. 11101/2005 yet with the following exceptions: cases that are labor-related or tax-related, and cases not regulated by this Law, in which the bankrupt might figure as claimant or co-respondent. The said provision would not apply to any measure involving legal action seeking some sort of creditor reimbursement. If, then, the Federal Government is not a creditor of the bankrupt estate, no measures affecting the estate could affect the Government, for it is entirely uninvolved with the bankruptcy issue.

Even if the situation were to be recast into one involving obligational liability (for reimbursement), no resolution of that question could possibly favor the bankrupt estate. Remember that the seizure by the Federal Court took place long before the financial institution filed for bankruptcy, and that alone would suffice to defeat any claims made by the bankrupt estate or the court handling it. The same would hold for claims of an eviction court case filed by the owner of the property in which the technical reserve of *Cid Ferreira Collection Empreendimentos Artísticos Ltda.* is currently held.

Furthermore, nearly all of the diversions took place with the agreement of creditors, who consented to these in exchange for large sums, and cannot therefore base their demands on claims that they are themselves victims or good-faith third parties.

Hence, the federal measures affecting all assets acquired by the defendants should prevail, as set forth in Article 125 of the Brazilian Code of Criminal Procedure, even if transferred to outside parties, in this case, to defendants Márcia de Maria Costa Cid Ferreira, Edna Ferreira de Souza e Silva, Renello Parrini and Ruy Ramazini.

Note also that the aforementioned Palermo Convention on Transnational Organized Crime allows international cooperation to that end (Article 13.1). It also expressly provides that the proceeds of illegal assets be allocated to a United Nations Fund to assist State Parties to obtain the wherewithal with which to enforce the Convention [Articles 14(3)(a) and 30(2)(c)].

Hence, even in the case of alienation of seized assets, the amount raised would not go to provide restitution to the bankrupt creditors.

The São Paulo City Council for the Preservation of Historical, Cultural and Environmental Patrimony (CONPRESP) voted unanimously at a meeting held on 12/20/2005, to begin procedures to declare as works of national heritage all works and documents of artistic, historical, archaeological and cultural value included in the holdings, property or possession of the *Instituto Cultural Banco Santos* and/or *Cid Ferreira Collection Empreendimentos Artísticos Ltda.* and/or Edemar Cid Ferreira and possible relatives, including those located at the property at 120 Rua Gália and any others in the collections subject to court-ordered. Still following this reasoning, we observe that Article 22 of Law No. 10032 of 12/27/1985, as amended by Law No. 10236 of 12/16/1986, does provide that goods given protected or monument status (a situation equivalent to the matter at hand, even though the procedure is barely begun) could only leave the city for purposes of cultural interchange.

The São Paulo State Protective Counsel for Historical, Archaeological, Artistic and Touristic Patrimony (CONDEPHAAT) has also declared those assets to be of historical interest.

5.2 Cases in the Press

5.2.1 Money Laundering Charges for Art Dealers. New York Times, 06/02/01; and Laundering Drug Money with Art. In: http://forbes.com/2003/04/08/cx_0408hot_print.html

Two New York art dealers, Shirley D. Sack and Arnold K. Katzen, were accused and convicted of laundering $4.1 million in drug trafficking proceeds after they were arrested by undercover agents in Boston. There were arrested at the Ritz-Carlton Hotel while trying to sell paintings that they claimed were originals by Modigliani and Degas to an agent impersonating a drug dealer. A third art dealer was charged with complicity. The court found that Shirley D. Sack was an art and jewelry wholesaler in charge of a limited liability company named after her. The co-defendant was held to be one of the primary partners of *American European Art Associates*, as revealed by an informant who later joined the operation. The prosecution also showed that there was an attempt to sell a painting by Raphael in exchange for money raised by selling drugs.

Shirley D. Sack revealed that the amounts received were to be transferred to an offshore account, and that the buyer was to have experienced a net loss. On being told by the undercover agent that 10–15% would be charged for laundering the money, Arnold K. Katzen then stated that the works could easily be sold at a 10% discount (to offset the loss) and that the money would be transferred slowly, with the customer already standing by in Europe ready to buy the Modigliani, *whatever the circumstances*.

One of the defendants pled guilty.

5.2.2 Money Laundering Through Artworks. Philippine Daily Inquirer, Cathy Yamsuan, 9/27/10

According to an article citing *The Financial Times Limited* as a source, mindful of the limitations on transportation of cash, gambling operators decided to acquire artworks by famous Filipino artists from international collectors. These paintings were chosen because they could easily be removed from their frames, rolled into

tubes and transported by the dozens all at once. The only requirement was that there be a certificate that they are subject to auctioning, which made it possible to get them through customs.

Once auctioned, according to the article, Christie's only asks the sellers where the proceeds from the sale ought to be deposited prior to being sent back to the Philippines. To attorney and collector Fernando Topacio, cited in the article, who would question money deposited as proceeds from an international auction house?

He believes the practice could explain the rapid increase in the price of artworks by a young Filipino artist.

5.2.3 Knoedler Gallery Seeks Dismissal of Fraud Suit. New York Times, Patricia Cohen, 05/16/12

Ann Freedman, former president of Knoedler & Company, filed motions in a U.S. court to dismiss a $17 million lawsuit from a customer alleging that the Knoedler Gallery, for years an established art dealer, sold a forged Jackson Pollock painting. The gallery and Ms. Freedman maintained that the painting is authentic, and tried to back that claim with declarations by two experts in an attempt to defeat a forensics examination that concluded that the piece was a forgery because the paint used was invented after Pollack's death. The defendant also argued that sophisticated buyers ought to look into the authenticity of works before purchasing.

5.2.4 Megaupload's Kim Dotcom Denied Bail in New Zealand. Agence France Presse English Wire, Erica Berenstain, 01/25/12

Kim Dotcom, the Internet millionaire, and six other persons, were accused of money laundering involving 175 million New Zealand dollars using fake documentation. Luxury cars and artworks were seized at his home, obtained through a vast and complex piracy network. His extradition to the United States was requested. Kim Dotcom was denied bail by Auckland Judge David McNaughton because "he had received $42 million from his Internet empire, and has passports and bank accounts under several different names." According to the judge, Mr. Dotcom's "vast wealth in no way ensures he has not hidden away money he might potentially use to flee the country."

5.2.5 Venerable Art Dealer Is Enmeshed in Lawsuits. New York Times, Doreen Carvajal and Carol Vogel, 04/19/11; Lost Art and a Mystery Vault: Billionaire French Dealer Claims His Institute Has No Record of Treasures. International Herald Tribune, Doreen Carvajal and Carol Vogel, 07/22/11

Guy Wildenstein, president of the venerable *Guy Wildenstein & Company*, which once operated in New York, Tokyo and Paris, was summoned to Paris to answer fraud investigations because French police had been to the company three times and seized a collection of art stolen by the Nazis from Jewish families that was thought to have disappeared. Thirty works of art were seized, shaking this respected French dynasty of prominent Jewish art dealers to its foundations.

According to the article, the Wildensteins were more than just dealers. For generations they were considered reliable and confidential counselors, offering discreet services and the use of their property to store valuable paintings when their customers passed away. The defendant alleges that one painting in particular (a Morisot) could have been the result of an "error or oversight under my father's operations."

He pointed out to the court that he had no inventory in his storage facility, located underground and believed to be a vault.

He is named as the respondent in several lawsuits.

5.2.6 Art Auctions 'Marred by Fakes, Cheats.' South China Morning Post, Priscilla Jiao, 06/20/11

According to the article, China's artwork auction market is marred by fake certificates of authenticity, and collusion between buyers, sellers and auctioneers in attempts to artificially boost prices, and is also used for laundering money.

There are records of officials having been bribed to over-appraise works of art, and quite a few were sold for very high prices at Hong Kong auctions.

It reports that *Poly International Auction*, a top-notch venue, earned 6.1 billion yuan. The taxes paid by this and other auction houses, such as Guardian, Hanhai and Council, were far than the profits from their annual revenues. It concluded that either there was tax evasion going on or that the reports of annual earnings were artificially inflated.

5.2.7 Orion Group Chairman Sentenced to Prison Over Slush Funds. Yon: Yonhap News Agency of Korea, 10/21/22

The chairman of the Orion Group, a media corporation, was sentenced to prison for fraud and embezzlement of corporate funds. Tam Cheol-gon embezzled $26.4 million from the media group and acquired valuable works of art to decorate his own home. Judge Han Chang-hun of the Seoul Central District Court said that money laundering by trading in art was a common practice among owners of huge conglomerates. The judge commented, “He is highly to blame for his crime of regarding affiliated firms as his personal assets and failing to manage the group in compliance with the law and maintain transparency.”

5.2.8 Money-Laundering: Third Directive Set to be Unveiled by Commission. European Report, 06/23/04

There is concern to require countries to enforce Directive 2001/97/EC to identify and report suspicious transactions to the authorities. Furthermore, Directive 91/308/EEC extends this beyond financial companies, to also cover attorneys, accountants, auditors (company or outside), tax consultants, brokers, notaries, dealers in precious stones, metals, artworks and casinos.

5.2.9 Making a Dent in the Trafficking of Stolen Art. Smithsonian, 9/1/95

The article recognizes the work of Constance Lowenthal, executive director of the International Foundation for Art Research (IFAR), known for her police work and research in the struggle against the theft of works of art.

It shows how the modern criminal underworld sees making money with art as the best thing going, for there is no way to explain, for instance, the price differences between a Manet and a Monet. Eastern European criminals are emptying churches of their holy statues and archaeological treasures.

IFAR keeps a database of missing artworks and collaborates with the Art Loss Register (ALR).

There is always the possibility that a stolen piece might pass through the hands of dozens of buyers, increasing the price and the chain of sales at flea markets.

According to the article, the great art robbery of the 1990s was never solved. This was the burglary of the Isabella Stewart Gardner Museum in Boston by a man and woman dressed as police officers. They tied up the guards and stripped the walls of all of their Vermeers, Rembrandts, and nine other treasures.

The piece concludes with an observation that art buyers, while giving free rein to their passion for art, should take pains to make legal acquisitions. They should not, in other words, be blinded or carried away by their sentiments.

5.2.10 Laundering Drug Money with Art. In: http://forbes.com/2003/04/08/cx_0408hot_print.html

Four people, including a Saudi Prince, were indicted for drug trafficking in Miami—and one was also charged with money laundering. Two works of art (by Francisco de Goya and Tsuguharu Foujita) were seized. One of the accused was said to have conducted financial operations to disguise the illegal origin of the money involved.

The deal involved two kilos of cocaine that left Caracas, Venezuela, for Paris, in a private jet owned by Nayef Al-Shaalan. The seizure of 190 kg. of cocaine on the Spanish border led authorities to the hideout in France.

It turns out that both the Prince (with no direct ties to the throne) and the two others involved were quite familiar with the art market. As a result of the laundering, the two paintings were sent to Miami in exchange for the drugs.

The article says that the U.S. Drug Enforcement Administration (DEA) believes that paintings nowadays are the way drug traffickers launder money. It is an investment for the proceeds of drug deals.

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